

In the Matter of:

Marcia L. Nordgren, et al

v.

County Board of Arlington, Virginia, et al

Trial Day 2

July 9, 2024

Casamo

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1 VIRGINIA: CIRCUIT COURT OF THE COUNTY OF ARLINGTON

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3 MARCIA L. NORDGREN, et al.,)
4 Plaintiffs,)

4

v

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5 COUNTY BOARD OF ARLINGTON,)
6 VIRGINIA, et al.,)
7 Defendants.)

RECORD

CL23001513-00

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Before Hon. David S. Schell, judge

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Arlington, Virginia

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July 9, 2024

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APPEARANCES: Blankingship & Keith, P.C.
(Mr. Gifford R. Hampshire and Ms. Wendy
18 E. Cousler), attorneys for the
19 plaintiffs.

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Arlington County Attorney's Office
(Ms. MinhChau Corr) and
20 Gentry Locke (Mr. Noah P. Sullivan and
21 Mr. Ryan J. Starks), attorneys for the
22 defendants.

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<p style="text-align: right;">Page 4</p> <p>1 (The court reporter was sworn.)</p> <p>2 THE COURT: We are on the record in</p> <p>3 Nordgren versus County Board. All counsel appear</p> <p>4 to be present.</p> <p>5 Are we ready for our next witness?</p> <p>6 MS. COUSLER: Yes, Your Honor.</p> <p>7 THE COURT: Please call the witness.</p> <p>8 (Ms. Fibel was sworn.)</p> <p>9</p> <p>10 -----oOo-----</p> <p>11</p> <p>12 MARGARET P. FIBEL,</p> <p>13 a plaintiff, called as a witness on her own behalf,</p> <p>14 having been first duly sworn, was examined and</p> <p>15 testified as follows:</p> <p>16</p> <p>17 DIRECT EXAMINATION</p> <p>18</p> <p>19 BY MS. COUSLER:</p> <p>20 Q Good morning, Ms. Fibel. Can you state</p> <p>21 your name for the record?</p> <p>22 A Margaret Pauline Fibel.</p>	<p style="text-align: right;">Page 6</p> <p>1 assessments and information about improvements, and it</p> <p>2 also shows the -- the sales in my neighborhood from a</p> <p>3 certain period of time.</p> <p>4 Q Directing your attention to the very top,</p> <p>5 it says, Owner, Fibel, Margaret P., TR. What does</p> <p>6 that mean?</p> <p>7 A That my house is part of my trust.</p> <p>8 Q Okay. And what is the name of the trust?</p> <p>9 A Margaret P. Fibel Trust. And I think the</p> <p>10 date is as of August 17th, 2010.</p> <p>11 Q And is the trust irrevocable or revocable?</p> <p>12 A It's revocable.</p> <p>13 Q Who is the trustee?</p> <p>14 A I am.</p> <p>15 Q Who is the beneficiary?</p> <p>16 A I am.</p> <p>17 MS. COUSLER: I would like to move for</p> <p>18 admission of Plaintiffs' Exhibit 55.</p> <p>19 MR. STARKS: No objection.</p> <p>20 THE COURT: Plaintiffs' 55 shall be</p> <p>21 admitted into evidence.</p> <p>22 (Marked in evidence by the court as</p>
<p style="text-align: right;">Page 5</p> <p>1 Q What is your address?</p> <p>2 A 3123 2nd Road North, Arlington, Virginia</p> <p>3 22201.</p> <p>4 Q How long have you lived at 3123 2nd Road</p> <p>5 North, Arlington, Virginia?</p> <p>6 A Twenty-four years.</p> <p>7 Q What neighborhood do you live in?</p> <p>8 A Lyon Park.</p> <p>9 Q Do you rent or own your property?</p> <p>10 A I own it.</p> <p>11 Q Do you own the property outright or is it</p> <p>12 owned by a trust?</p> <p>13 A A trust.</p> <p>14 Q I'm going to direct your attention to</p> <p>15 Exhibit 55, Plaintiffs' Exhibit 55. Yes. It should</p> <p>16 be in the first binder. Okay. Do you recognize this</p> <p>17 document?</p> <p>18 A Yes.</p> <p>19 Q What is it?</p> <p>20 A It is the information that's available on</p> <p>21 the Arlington County website under property</p> <p>22 assessments, and it shows the ownership and</p>	<p style="text-align: right;">Page 7</p> <p>1 Plaintiffs' Exhibit Number 55.)</p> <p>2</p> <p>3 BY MS. COUSLER:</p> <p>4 Q Okay. I'm going to show you what has been</p> <p>5 marked as Plaintiffs' Exhibit 57. Do you recognize</p> <p>6 this photo?</p> <p>7 A Yes. It's my house, and it's a photo that</p> <p>8 I took actually.</p> <p>9 Q So you would say it's a fair and accurate</p> <p>10 representation?</p> <p>11 A Yes.</p> <p>12 MS. COUSLER: I'm going to move for the</p> <p>13 admission of Exhibit 57.</p> <p>14 MR. STARKS: No objection.</p> <p>15 THE COURT: Plaintiffs' 57 shall be</p> <p>16 admitted into evidence.</p> <p>17 (Marked in evidence by the court as</p> <p>18 Plaintiffs' Exhibit Number 57.)</p> <p>19</p> <p>20 BY MS. COUSLER:</p> <p>21 Q Have you ever looked up your home on</p> <p>22 Google Maps?</p>

<p style="text-align: right;">Page 8</p> <p>1 A Yes.</p> <p>2 Q I'm going to turn your attention to</p> <p>3 Exhibit 52. Are you familiar with the satellite</p> <p>4 photographic images available on Google Maps?</p> <p>5 A Yes.</p> <p>6 Q Is this a fair and accurate representation</p> <p>7 of your property?</p> <p>8 A Yes.</p> <p>9 MS. COUSLER: Okay. I'm going to move for</p> <p>10 the admission of Plaintiffs' Exhibit 52.</p> <p>11 MR. STARKS: No objection.</p> <p>12 THE COURT: Plaintiffs' 52 is admitted</p> <p>13 into evidence.</p> <p>14 (Marked in evidence by the court as</p> <p>15 Plaintiffs' Exhibit Number 52.)</p> <p>16</p> <p>17 BY MS. COUSLER:</p> <p>18 Q Now I'm going to show you what has been</p> <p>19 marked as Defendants' Number 9. Okay. I'll get you a</p> <p>20 copy.</p> <p>21 A There are some documents up here in front</p> <p>22 of me.</p>	<p style="text-align: right;">Page 10</p> <p>1 five blocks from Route 50, and it doesn't quite</p> <p>2 go as far as to show where the metro station is</p> <p>3 on Highland Street.</p> <p>4</p> <p>5 BY MS. COUSLER:</p> <p>6 Q Okay. You've seen Defendants' Exhibit 9.</p> <p>7 Would you describe that area surrounding? I guess you</p> <p>8 already kind of did that, but is there anything</p> <p>9 noteworthy you'd like to point out on that?</p> <p>10 A Well, is this a point where I can talk</p> <p>11 about Lyon Park when we have the map in front of us</p> <p>12 to --</p> <p>13 MR. STARKS: Object to the question.</p> <p>14 THE COURT: Just do the best you can and</p> <p>15 answer any question counsel -- counsel --</p> <p>16 MR. STARKS: The characterization of</p> <p>17 noteworthy maybe is a little vague.</p> <p>18 THE COURT: The objection is sustained.</p> <p>19 Counsel will get to whatever counsel wishes to</p> <p>20 get to in due course, so just do your best to</p> <p>21 answer the question.</p> <p>22 THE WITNESS: Okay. The only other thing</p>
<p style="text-align: right;">Page 9</p> <p>1 Q That won't be Exhibit Number 9.</p> <p>2 Do you recognize this photo?</p> <p>3 A Yes.</p> <p>4 Q What is it?</p> <p>5 A It shows -- on the left-hand side, it</p> <p>6 shows my house and my address. And on the right-hand</p> <p>7 side, it shows approximately -- well, it shows where</p> <p>8 it is in a larger context than is shown in 52.</p> <p>9 Q Okay. And do you recognize the location</p> <p>10 of the red dot on the photo?</p> <p>11 A Yes.</p> <p>12 Q What is it?</p> <p>13 MR. STARKS: Excuse me. I don't have a</p> <p>14 copy of the exhibit.</p> <p>15 MS. COUSLER: You don't have a copy of</p> <p>16 Defense Exhibit 9?</p> <p>17 MR. STARKS: Number 9?</p> <p>18 MS. COUSLER: Number 9.</p> <p>19 MR. STARKS: Okay.</p> <p>20 THE WITNESS: It shows that my house is</p> <p>21 close to the intersection of 2nd Road and Irving</p> <p>22 Street, and it shows that I am -- I think it's</p>	<p style="text-align: right;">Page 11</p> <p>1 that I would note is that Lyon Park is bounded on</p> <p>2 two sides by Route 50, which is also known as</p> <p>3 Arlington Boulevard, so the eastern boundary is</p> <p>4 Route 50 as well as the southern boundary.</p> <p>5 MS. COUSLER: I would like to move for</p> <p>6 admission of Defendants' Exhibit 9.</p> <p>7 MR. STARKS: No objection.</p> <p>8 THE COURT: Did you say, Defendants' 9?</p> <p>9 MS. COUSLER: Defendants' 9.</p> <p>10 THE COURT: Defendants' 9 is admitted into</p> <p>11 evidence.</p> <p>12 (Marked in evidence by the court as</p> <p>13 Defendants' Exhibit Number 9.)</p> <p>14</p> <p>15 BY MS. COUSLER:</p> <p>16 Q Okay. I'm going to show you a copy of</p> <p>17 what's been marked as Plaintiffs' Exhibit 54. Do you</p> <p>18 recognize this document?</p> <p>19 A Yes. It's also the information that's</p> <p>20 available from the mapping system on the Arlington</p> <p>21 County website that you can get through the property</p> <p>22 search function.</p>

<p style="text-align: right;">Page 12</p> <p>1 MS. COUSLER: I'm going to move for 2 admission of Plaintiffs' Exhibit 54. 3 MR. STARKS: No objection. 4 THE COURT: Plaintiffs' 54 shall be 5 admitted into evidence. 6 (Marked in evidence by the court as 7 Plaintiffs' Exhibit Number 54.) 8 THE COURT: Let me make an inquiry. Are 9 there any witnesses in the courtroom? If so, 10 would you please stand. 11 All right. Thank you. You may proceed. 12 MS. COUSLER: Thank you, Your Honor. 13 14 BY MS. COUSLER: 15 Q Do you have -- do you know what R district 16 your property is zoned? 17 A Yes. It's in R-6. 18 Q Do you know anything about what an R-6 19 means? 20 A Yes. It means that the minimum-sized lot 21 should be 6,000 square feet. 22 Q I'm going to show you what has been marked</p>	<p style="text-align: right;">Page 14</p> <p>1 In the sixties, the family that lived 2 there added on some -- some -- added on a room on the 3 first floor and also enlarged the second floor, so the 4 story-and-a-half was now -- well, then when I bought 5 the house and then had a dormer in the back and a flat 6 roof addition with a basement, unfinished basement 7 underneath. 8 Q Why did you choose to purchase your home? 9 A I looked for a house for four years. I 10 was living elsewhere in Arlington, and I looked for a 11 house for four years in order to find some place that 12 was close in that had -- the house had good bones, and 13 I had -- have always liked to live with birds and 14 trees, and so originally I had -- when I bought the 15 house, I had four, like, hundred-year-old oak trees. 16 Q If I refer to the Expanded Housing Option 17 Amendment, do you know what I'm referencing? 18 A Yes. 19 Q Is it okay with you if we call it the EHO 20 amendment? 21 A Yes. 22 Q Do you know -- did you follow the EHO</p>
<p style="text-align: right;">Page 13</p> <p>1 as Plaintiffs' Exhibit 53. Is this a fair and 2 accurate representation of your property? 3 A Yes. 4 MS. COUSLER: I move for admission of 5 Plaintiffs' Exhibit 53. 6 MR. STARKS: No objection. 7 THE COURT: Plaintiffs' 53 shall be 8 admitted into evidence. 9 (Marked in evidence by the court as 10 Plaintiffs' Exhibit Number 53.) 11 12 BY MS. COUSLER: 13 Q Looking at your Exhibit 57, 52, and 53, 14 would you describe your home to the court? 15 A My house was called an Arlington story- 16 and-a-half house, which means that the main living 17 space is on the first floor. And originally when the 18 house was built in the thirties, the upstairs was just 19 the attic that is accessible through inside stairs but 20 is basically in the gable, and this is not the gable 21 end of my house. The side would be the gable end of 22 my house.</p>	<p style="text-align: right;">Page 15</p> <p>1 amendment process? 2 A I followed it a little bit but not 3 extensively. 4 Q Do you remember if it went by another name 5 before EHO amendment? 6 A I remember two names. One was Missing 7 Middle and the other one was Upzoning. 8 Q When did you first hear about Missing 9 Middle Housing? 10 A It actually goes a long way back. It goes 11 back to a conversation that I had standing on a street 12 corner in the dark in the summer of 2009. 13 Q And what was that conversation in 2009? 14 A It was with Eric Mitchell, who was then a 15 member of the planning commission I think. 16 Q What did you understand his idea of 17 Missing Middle to be? 18 A That it was to address the housing needs 19 of first responders, teachers, nurses, and that he was 20 especially focused on the now Langston Highway 21 corridor. 22 MR. STARKS: Objection. Hearsay, Your</p>

<p style="text-align: right;">Page 16</p> <p>1 Honor.</p> <p>2 THE COURT: The objection is sustained as</p> <p>3 to the statement of the individual.</p> <p>4</p> <p>5 BY MS. COUSLER:</p> <p>6 Q Are you in favor of the county creating</p> <p>7 housing opportunities for first responders, nurses,</p> <p>8 and teachers?</p> <p>9 A Yes.</p> <p>10 Q After hearing about the Missing Middle in</p> <p>11 2009, when did you hear about it again?</p> <p>12 A The next point was in the fall of 2020</p> <p>13 when I started seeing the yellow signs saying, No</p> <p>14 Upzoning. Sorry. 2022.</p> <p>15 Q What, if anything, did you do after</p> <p>16 finding out about the Missing Middle initiative in</p> <p>17 2022?</p> <p>18 A There was a second time when I heard about</p> <p>19 it, which was when I was -- it was like November of</p> <p>20 2022 and I was greeting voters at my polling place and</p> <p>21 people asked me --</p> <p>22 MR. STARKS: Objection to hearsay.</p>	<p style="text-align: right;">Page 18</p> <p>1 A I looked at a very early draft. The one</p> <p>2 that I have saved on my computer was dated in December</p> <p>3 of 2022, but I didn't download it until the beginning</p> <p>4 of March of 2023.</p> <p>5 Q Have you read the EHO amendment?</p> <p>6 A I have tried. I tried back in March of</p> <p>7 2023, and I tried again and I found all of the options</p> <p>8 very confusing, even though I know now what has been</p> <p>9 adopted.</p> <p>10 Q And what has been adopted? To your</p> <p>11 understanding, what has been adopted?</p> <p>12 A So it's a policy that allows by-right in</p> <p>13 the Residential Zones 5, 6, 8, 10, and 20 for</p> <p>14 development of four different kinds of houses.</p> <p>15 Duplexes, semidetached townhouses up to three in a</p> <p>16 row, and what have been called multiplexes of four to</p> <p>17 six units.</p> <p>18 THE COURT: Counsel, would you remove the</p> <p>19 water bottle from the table. I would prefer not</p> <p>20 to have water rings on the table. Thank you.</p> <p>21 Go ahead, counsel.</p> <p>22 THE WITNESS: And it also sets --</p>
<p style="text-align: right;">Page 17</p> <p>1 THE COURT: The objection is sustained.</p> <p>2 Please re-state the question.</p> <p>3</p> <p>4 BY MS. COUSLER:</p> <p>5 Q So I guess I was just trying to figure out</p> <p>6 when you discussed missing -- or found out -- what did</p> <p>7 you do after you found out about Missing Middle again</p> <p>8 when it came up in 2022?</p> <p>9 A So in January of 2023, I read a document</p> <p>10 that had been submitted to the Arlington County Board</p> <p>11 called -- sorry -- Guidebook for Missing Middle, and</p> <p>12 it was produced by architects with whom I had worked</p> <p>13 on my house and other projects.</p> <p>14 Q Did you go online to look at any documents</p> <p>15 about the Missing Middle?</p> <p>16 A I did, but those were later. I decided</p> <p>17 that I would testify at the county hearing, and I --</p> <p>18 before -- in anticipation of that, I looked at the</p> <p>19 Missing Middle documents that were available on the</p> <p>20 county website.</p> <p>21 Q Did you look at a draft of the staff</p> <p>22 report?</p>	<p style="text-align: right;">Page 19</p> <p>1 BY MS. COUSLER:</p> <p>2 Q There's no question.</p> <p>3 A I'm sorry.</p> <p>4 Q That's okay. What, if any, particular</p> <p>5 concerns did you have about the EHO amendment?</p> <p>6 A In the past or today?</p> <p>7 Q Let's start with the past.</p> <p>8 A Okay. So the additional item that I was</p> <p>9 trying to add is one of my concerns, which is about my</p> <p>10 house is within the three-quarter-mile radius of two</p> <p>11 metro stations, Clarendon and Virginia Square, and one</p> <p>12 of the provisions of EHO was that new development is</p> <p>13 required to only provide half a parking space for</p> <p>14 every dwelling unit.</p> <p>15 So based on my experience with the brick</p> <p>16 house next to me that is a rental where there are --</p> <p>17 sometimes there are families and sometimes there are</p> <p>18 single group -- single women, single men -- we've had</p> <p>19 both -- group houses where there are four people</p> <p>20 living in the house, that parking is an issue. Not so</p> <p>21 much when it's a family living there but when it's a</p> <p>22 group house, because then we have four cars of the</p>

<p style="text-align: right;">Page 20</p> <p>1 people who live there, plus on the weekends and 2 evenings probably twice that number. So parking was 3 an issue. And other things are already issues. Like 4 the capacity of the sewer pipes, the capacity of the 5 water. 6 MR. STARKS: Objection. Foundation. 7 THE COURT: Objection sustained. 8 MS. COUSLER: The court's indulgence. 9 10 BY MS. COUSLER: 11 Q I asked you about what concerns did you 12 have. You said stormwater sewer capacity was the 13 problem? 14 A Sewer capacity. I experienced three 15 backups in my basement, which is an unfinished 16 basement, where water and in one case for sure sewage 17 came up through the line when the county cleaned -- 18 the middle time was when the county cleaned out the 19 sewer line, and I learned at that time -- that was in 20 2012, and there was one prior to that that I can't 21 really place in time, and then there was one in 2018. 22 And in 2012 I learned that the county wanted to, and I</p>	<p style="text-align: right;">Page 22</p> <p>1 having four adults living in the house next to me that 2 each adult has a car. I think that's also the case 3 with the families that live on my street, a couple of 4 exceptions, where there's usually one car per adult. 5 Q And so you believe that -- can you -- so 6 the EHO will have a problem because there's going to 7 be more than one adult? Is that what you are 8 concerned about? 9 A Well, for example, in the house to my 10 left, there are two adults and one car. If that house 11 were to be replaced with three townhouses, I would 12 expect that there would be at least three adults. 13 MR. STARKS: Objection. Foundation. 14 THE COURT: Objection overruled. 15 16 BY MS. COUSLER: 17 Q Have you been following whether or not EHO 18 permits have been issued? 19 A Yes. 20 Q Have you been following that in your 21 neighborhood? 22 A I've been following it for Lyon Park and</p>
<p style="text-align: right;">Page 21</p> <p>1 believe did, replace a six-inch terra cotta pipe with 2 an eight-inch metal pipe from Highland Street to about 3 halfway down the -- 4 MR. STARKS: Objection. Hearsay. 5 Foundation. 6 THE COURT: Objection sustained. 7 MS. COUSLER: As to which one? I think 8 the foundation is that she has experienced this. 9 THE COURT: Well, there's no foundation 10 that she actually saw that. 11 12 BY MS. COUSLER: 13 Q Did you see the construction of the water 14 main in your neighborhood? 15 A I was away during the time that the sewer 16 pipe was replaced. 17 Q Okay. Did you have any other -- let's 18 start with the parking. You said you had mentioned 19 concerns about EHO parking. Why do you believe that 20 it will cause additional problems? If EHO development 21 will cause additional problems to parking? 22 A Well, I've learned from my experience with</p>	<p style="text-align: right;">Page 23</p> <p>1 for Ashton Heights. My property is right on the -- 2 almost on the dividing line, so those are the -- the 3 ones that I've been following. 4 Q Do you know if there's any planned -- or 5 if any issues have been put -- any permits have been 6 issued near your home? 7 A Yes. There are four in the area -- four 8 that have been issued in the area that I've been 9 following. 10 Q Okay. What are those four? 11 A So the closest one is at 2909 2nd Road 12 North, which is about three blocks from my house, and 13 then there's another one -- I don't remember the exact 14 address, but it's on 7th Street North, and that one 15 is -- it's on the walk to the metro, so it's maybe not 16 quite half a mile from my house. Both of those are 17 for three townhouses, and then there are two in Ashton 18 Heights that -- I think they've both been issued. 19 One -- there are two buildings, twenty -- excuse me -- 20 627 and 629 North Monroe Street, and one is for a 21 sixplex and the other one is for three townhouses. 22 Q I'm going to show you what has been marked</p>

<p style="text-align: right;">Page 24</p> <p>1 as --</p> <p>2 THE COURT: How far away are those two?</p> <p>3 Do you know?</p> <p>4 THE WITNESS: Those are maybe seven-tenths</p> <p>5 of a mile. The metro is -- the --</p> <p>6 THE COURT: All right. Thank you.</p> <p>7 Proceed.</p> <p>8 THE WITNESS: It's a little less than the</p> <p>9 metro.</p> <p>10</p> <p>11 BY MS. COUSLER:</p> <p>12 Q I'm going to show you what's been marked</p> <p>13 as -- I think it's already -- yes. It's already in</p> <p>14 evidence. It's Plaintiffs' Exhibit 95.</p> <p>15 A Yep.</p> <p>16 Q What is it?</p> <p>17 A This is the information that's available</p> <p>18 through the Arlington County website if you look under</p> <p>19 EHO and then drill down into the permits.</p> <p>20 Q And you've looked at this website?</p> <p>21 A Yes, extensively.</p> <p>22 Q If I turn your attention to what has been</p>	<p style="text-align: right;">Page 26</p> <p>1 BY MS. COUSLER:</p> <p>2 Q At the top is that the 2nd Road address?</p> <p>3 A Yes.</p> <p>4 Q You said that's about three blocks from</p> <p>5 your home?</p> <p>6 A Yes.</p> <p>7 Q Now we're going to turn to EHO 006269.</p> <p>8 And, again, at the top is that the other Monroe</p> <p>9 address you were referencing?</p> <p>10 A Yes.</p> <p>11 Q And those you said are about .7 miles away</p> <p>12 from your home?</p> <p>13 A Yes.</p> <p>14 Q All right. And now I'm going to show you</p> <p>15 what has been marked as Defendants' Exhibit 82 and</p> <p>16 Defendants' Exhibit 83. Do you recognize Defendants'</p> <p>17 Exhibit 82?</p> <p>18 A Yes. It's a map of Lyon Park and Ashton</p> <p>19 Heights with my house as the red point, and it seems</p> <p>20 to show a mile circumference from my house, and there</p> <p>21 are a number of pins that indicate the EHO permits</p> <p>22 that have been either -- let's see -- either applied</p>
<p style="text-align: right;">Page 25</p> <p>1 Bates labeled on the upper right-hand corner EHO</p> <p>2 006248.</p> <p>3 A Yep.</p> <p>4 Q At the very top -- not at the very top.</p> <p>5 Sorry. Within the list of EHO permits, is that the</p> <p>6 629 North Monroe Street you were referencing?</p> <p>7 A Yes.</p> <p>8 Q I'm going to turn your attention to EHO</p> <p>9 006253.</p> <p>10 A Yes.</p> <p>11 Q Again, at the top is that the 7th Street</p> <p>12 address you were referencing?</p> <p>13 A Yes.</p> <p>14 Q Turn your attention to exhibit -- sorry --</p> <p>15 EHO 006263.</p> <p>16 THE COURT: Counsel, give me the Bates</p> <p>17 number of the second one.</p> <p>18 MS. COUSLER: Yes, Your Honor. Apologies.</p> <p>19 006253.</p> <p>20 THE COURT: Thank you. And now the one</p> <p>21 you are looking at now.</p> <p>22 MS. COUSLER: 006263.</p>	<p style="text-align: right;">Page 27</p> <p>1 for or issued.</p> <p>2 Q I believe it's applied for.</p> <p>3 A Just applied for?</p> <p>4 Q If you can check Defendants' Exhibit 83.</p> <p>5 Do you recognize this document?</p> <p>6 A Yes.</p> <p>7 Q Okay. What is it?</p> <p>8 A So it's the same map showing my house in</p> <p>9 relation to a mile circumference, and this one shows</p> <p>10 just the approved permits.</p> <p>11 MS. COUSLER: Okay. I'm going to move for</p> <p>12 the admission of Defendants' 82 and 83.</p> <p>13 THE COURT: They shall be admitted.</p> <p>14 MR. STARKS: Yeah. No objection, Your</p> <p>15 Honor. These have actually been stipulated to by</p> <p>16 the parties. Defense Exhibit 78, 80, 82, 84, 86,</p> <p>17 88, 90, and 92, the parties stipulate that they</p> <p>18 accurately depict on the map of Arlington County</p> <p>19 each plaintiff's house and any properties within</p> <p>20 a one-mile radius for which an EHO application</p> <p>21 has been submitted regardless of the status of</p> <p>22 that application as listed in Defense Exhibit</p>

<p>Page 28</p> <p>1 312, and Defense Exhibits 79, 81, 83, 85, 87, 89, 2 91, and 93 accurately depict on a map of 3 Arlington County each plaintiff's house and any 4 properties within a one-mile radius for which an 5 EHO application has been submitted and approved 6 as listed in Defense Exhibit 311. 7 THE COURT: Thank you, counsel. 8 82 and 83 at this point are admitted into 9 evidence. 10 (Marked in evidence by the court as 11 Defendants' Exhibit Numbers 82 and 83.) 12 13 BY MS. COUSLER: 14 Q Directing your attention to Exhibit 82, 15 how many applications -- how many permits have been 16 applied for for EHO development in your one-mile 17 radius? 18 A According to this, there are eleven. 19 Q And if you're looking at Exhibit 83, how 20 many permits within a mile of your home have been 21 approved? 22 A According to this, there are five.</p>	<p>Page 30</p> <p>1 MS. COUSLER: Your Honor, we're just 2 asking why she thinks that Lyon Park is special 3 as far as we've seen a number of EHO permits 4 that -- 5 MR. STARKS: Special is a vague -- 6 THE COURT: Well, as I recall the 7 question, it was, Why is it special in relation 8 to the number of permits, and the objection is 9 sustained as to that question. There may be 10 reasons why it's special that you can go into 11 individually, but to have her give an opinion is 12 inadmissible. 13 14 BY MS. COUSLER: 15 Q Why do you think there are more permits in 16 Lyon Park? 17 MR. STARKS: Object again because it calls 18 for an opinion about the application of the 19 zoning ordinance to her neighborhood. 20 21 BY MS. COUSLER: 22 Q Why do you think there are eleven permits?</p>
<p>Page 29</p> <p>1 Q Okay. Is there anything else you learned 2 while looking at the EHO permit tracker online? 3 A In order to understand really what was 4 going on with these, I compared information from the 5 EHO tracker with the information on property with the 6 county property information, and I learned that -- 7 let's see -- for the four approved properties in Lyon 8 Park and Ashton Heights -- so that doesn't include 9 Number 4 on this map -- I learned that the sale price 10 in each case was below the Arlington County assessed 11 price -- assessment price -- assessment value. 12 Q What, if anything, makes Lyon Park special 13 in terms of EHO permit distribution at least in your 14 understanding? 15 A Well, Lyon Park is actually a very 16 wonderful place to live. 17 MR. STARKS: Objection. Foundation. 18 MS. COUSLER: There's a pending objection. 19 THE COURT: I did not hear it. 20 MR. STARKS: So I objected to foundation. 21 It's calling for her to interpret the statute as 22 it applies to her neighborhood.</p>	<p>Page 31</p> <p>1 Sorry. 2 THE COURT: The objection is sustained. 3 Is there a subway nearby? Is there a 4 subway close to your house? 5 THE WITNESS: Yes, sir, there are two. 6 THE COURT: Thank you. Next question. 7 8 BY MS. COUSLER: 9 Q What is attractive about Lyon Park to you? 10 A Lyon Park is a real community where -- it 11 was founded in 1919, and we're on the historic 12 register because we have a lot of what are called kit 13 homes, which are also known as Sears Homes, although 14 Sears was not the only purveyor of those. We 15 collectively -- I'm going to simplify this, but we 16 collectively own a park and a community building, and 17 there are a lot of activities like every month, every 18 week in there. And since it's owned by the community, 19 we don't get any funding from Arlington County to pay 20 for having the grass cut, so we're always doing fund- 21 raising kinds of activities like bake sales and 22 pancake breakfasts and plant sales, and I've been</p>

<p style="text-align: right;">Page 32</p> <p>1 involved in some of those. We -- in the last ten 2 years, we renovated the community center, and that I 3 think really brought the community together in a 4 different way.</p> <p>5 Q Okay. You said you were -- mentioned one 6 of your concerns was the impact EHO permits would have 7 on parking on your street. I'm going to show you 8 what's been marked as Plaintiffs' Exhibit 56 and I'm 9 going to have you turn specifically to -- it's -- the 10 Bates stamp is on the bottom right-hand corner -- ArCo 11 7823.</p> <p>12 A Okay. I have to find 56 first.</p> <p>13 Q Yes. It should be in the first binder.</p> <p>14 A Yep. Sorry. What page?</p> <p>15 Q It's ArCo 7823 and ArCo 7824.</p> <p>16 A Yes. 23.</p> <p>17 Q Do you recognize these photos?</p> <p>18 A 23 is a photo of the north side. So the 19 fence is my property, and it shows the cars there. I 20 would say that there is a half a space in front of 21 this -- the first car here before you get to my 22 driveway. I -- the day that I was writing my</p>	<p style="text-align: right;">Page 34</p> <p>1 pain because the trash truck has to go through the 2 center and if you're behind the trash truck, you have 3 made a mistake. And 2nd Road is also -- goes from 4 Washington Boulevard to a little bit past Jackson 5 Street, and it goes to the cemetery but -- and I've 6 seen an increase in traffic, especially in the 7 evening. My kitchen window faces the intersection of 8 2nd Road and Irving Street, and there can be six cars 9 that are waiting. There's a stop sign at 2nd Road and 10 there -- if you turn left at 2nd Road -- excuse me. 11 If you turn left at Irving Street, you can go down to 12 Route 50 where there's a traffic light, so it's a 13 little easier to access Route 50 there.</p> <p>14 Q Do you know if that .5 parking space 15 requirement applies to all EHO development or only in 16 certain areas?</p> <p>17 A It's only in certain areas. It's --</p> <p>18 MR. STARKS: Object to foundation.</p> <p>19 THE COURT: Objection overruled. She 20 indicated she looked at the documentation. 21 22</p>
<p style="text-align: right;">Page 33</p> <p>1 interrogatories, I just went outside and I took a 2 photo of the existing condition.</p> <p>3 Q So it's safe to say it's a fair and 4 accurate representation of your street outside?</p> <p>5 A Yes.</p> <p>6 Q What time of day?</p> <p>7 A It was in the morning a little bit before 8 nine o'clock.</p> <p>9 Q You already talked about the parking 10 spaces being reduced near the metro. Do you know what 11 the parking space requirement is?</p> <p>12 A Yes. It's for the new development --</p> <p>13 Q For new development.</p> <p>14 A -- it's half an on-site space for each 15 dwelling.</p> <p>16 Q Okay. And what about these photos makes 17 you concerned about EHO development in your 18 neighborhood?</p> <p>19 A Well, I think that we already have a lot 20 of cars. The traffic on 2nd Road, two cars can't 21 usually pass at the same time. You have to stop and 22 wait for somebody. And on trash day it's kind of a</p>	<p style="text-align: right;">Page 35</p> <p>1 BY MS. COUSLER:</p> <p>2 Q Do you know if there are others in the R 3 districts that have the same parking space 4 requirements for EHO development as you or is it 5 different?</p> <p>6 A It's different, because I live near -- I 7 live within three-quarter mile of a metro station. In 8 fact, I live within three-quarter miles of two metro 9 stations. One of my good friends who lives elsewhere 10 in Arlington is a mile and a half from a metro 11 station, and her property -- her parking would not -- 12 let's see. How can I say this? If an EHO sixplex 13 came next to her, she would not have the same half a 14 space per unit.</p> <p>15 Q Do you know what residential --</p> <p>16 MR. STARKS: Your Honor, I object to this 17 line of questioning to the extent it asks for her 18 opinion about what might happen with her friend 19 in a different zoning district as applied to the 20 statute.</p> <p>21 THE COURT: I understand the objection, 22 and I'm going to treat this as her understanding</p>

<p style="text-align: right;">Page 36</p> <p>1 of the zoning amendment. It may not necessarily</p> <p>2 be accurate, and you will have an opportunity to</p> <p>3 address that with other witnesses and even on</p> <p>4 cross-examination if you wish. So your objection</p> <p>5 is partially sustained.</p> <p>6 Proceed.</p> <p>7</p> <p>8 BY MS. COUSLER:</p> <p>9 Q Do you know what residential district she</p> <p>10 lives in?</p> <p>11 A Yes. She's in an R-6.</p> <p>12 Q Okay. Do you have any other concerns</p> <p>13 about EHO development?</p> <p>14 A Yes.</p> <p>15 Q What are they?</p> <p>16 A Again, my experience with Arlington County</p> <p>17 infrastructure, the possible loss of more trees,</p> <p>18 the -- we've talked about parking. And my street</p> <p>19 especially has two characteristics. It's part of a</p> <p>20 very quiet neighborhood, and also the houses -- we</p> <p>21 don't have any McMansions on my part of the street,</p> <p>22 and so all of the houses are within the same scale,</p>	<p style="text-align: right;">Page 38</p> <p>1 Q And that's a single-family home?</p> <p>2 A Yes.</p> <p>3 Q And I think you mentioned a rental as well</p> <p>4 on your block where you had some turnover?</p> <p>5 A There are four rental units on my square</p> <p>6 block. The one next to me, the one -- I think it's</p> <p>7 301 Irving Street. Those two are two of the four</p> <p>8 houses with whom I share a property line, and then</p> <p>9 there are two on Highland Street with whom I don't</p> <p>10 share a property line.</p> <p>11 Q Understood. And at any given time or I</p> <p>12 guess on a lease-to-lease basis, more or fewer folks</p> <p>13 could live in those homes as well?</p> <p>14 A Yes.</p> <p>15 Q Have you witnessed in your experience</p> <p>16 where different tenants might have a different number</p> <p>17 of cars that they drive?</p> <p>18 A The only difference that I have seen is</p> <p>19 with both the brick house next to me and the house on</p> <p>20 Irving Street is when there are families there, there</p> <p>21 are fewer cars. When it's been a group house -- and</p> <p>22 I'm talking about my experience over the twenty-four</p>
<p style="text-align: right;">Page 37</p> <p>1 size and scale.</p> <p>2 MS. COUSLER: Okay. I have no further</p> <p>3 questions at this time. Please answer any</p> <p>4 questions the defense might have for you.</p> <p>5</p> <p>6 CROSS-EXAMINATION</p> <p>7</p> <p>8 BY MR. STARKS:</p> <p>9 Q Hi, Ms. Fibel. How are you?</p> <p>10 A Hi.</p> <p>11 Q Ryan Starks for the County. So I believe</p> <p>12 that you started talking about your neighbors, and I'd</p> <p>13 like to talk about that a little bit. So it's my</p> <p>14 understanding that there is a group home near your</p> <p>15 home?</p> <p>16 A Yes. Right next door to me.</p> <p>17 Q And how many folks live there?</p> <p>18 A As far as I can tell, there are four at</p> <p>19 the moment.</p> <p>20 Q And at any given time, may more or fewer</p> <p>21 people live in that home?</p> <p>22 A Few.</p>	<p style="text-align: right;">Page 39</p> <p>1 years that I've lived with those folks as my</p> <p>2 neighbors. When it's a group house, there are at</p> <p>3 least one car per occupant.</p> <p>4 Q Do you know the owners of those rental</p> <p>5 homes?</p> <p>6 A I -- a long time ago, I met the owner of</p> <p>7 the brick house, and the owners of the house on Irving</p> <p>8 Street are relatively new. I have met them, but they</p> <p>9 are also away. So they were here for a year and then</p> <p>10 gone.</p> <p>11 Q And is it your understanding that they</p> <p>12 could alter the rental home in a way that they see fit</p> <p>13 to maybe accommodate more tenants or cut down trees</p> <p>14 that are on the property for example?</p> <p>15 A Within the limits of what's allowed for a</p> <p>16 single-family home in Arlington of the lots of their</p> <p>17 size.</p> <p>18 Q And what about in your neighborhood? Are</p> <p>19 you aware of any particular building codes that might</p> <p>20 restrict the way in which a home is altered?</p> <p>21 A Well, not that are specific to Lyon Park.</p> <p>22 Q I think that you testified earlier about</p>

<p style="text-align: right;">Page 40</p> <p>1 the character of your neighborhood and that some of 2 the homes look a certain way. Are you aware of any 3 building codes that might restrict the size and scale 4 of homes in Lyon Park or in your neighborhood? 5 A Only the general requirements of Arlington 6 County Code. 7 Q And so you testified earlier about a 8 number of permits for EHO development specifically 9 that were either applied for or applied for and then 10 approved? 11 A Yes. 12 Q Have any of those applied-for-and-approved 13 EHO applications, has there been any construction that 14 has started on any of those homes? 15 A The house at 62 -- 629 North Monroe Street 16 has been demolished. 17 Q Has any structure been constructed in its 18 place? 19 A Not yet. 20 Q Do you know why that might be? 21 A I can give you my opinion. Is that what 22 you're asking for?</p>	<p style="text-align: right;">Page 42</p> <p>1 Q And you couldn't prevent your neighbors 2 from doing the same to their homes? 3 A I couldn't prevent things that are -- I'm 4 sorry. Could you ask me more specifically again. 5 Q I'm just asking whether you could prevent 6 your neighbors from maybe cutting down a tree or 7 altering their home in a way that is allowed under the 8 Arlington Code? 9 A That's correct. If it's allowed under the 10 Arlington Code. If it requires a variance because 11 they want -- if it requires a variance, then I would 12 have the opportunity to -- 13 MS. COUSLER: Objection. Calls for a 14 legal conclusion. 15 THE COURT: The objection is sustained. 16 17 BY MR. STARKS: 18 Q And it's your testimony that no EHO 19 projects have been built, correct? 20 A I believe that -- yes, that's correct. 21 None of these four that I've been following have been 22 built.</p>
<p style="text-align: right;">Page 41</p> <p>1 Q Do you think it might be because there are 2 certain building codes that are in place that may have 3 prevented construction from going forward even after 4 the EHO application was approved? 5 MS. COUSLER: Objection. Lack of 6 foundation. 7 THE COURT: Objection sustained. 8 What was the address again? 9 THE WITNESS: It is 629 North Monroe 10 Street. It's Number 1. 11 THE COURT: All right. Thank you. 12 13 BY MR. STARKS: 14 Q Has your ability to utilize your property 15 in a way in which you desire been impacted in any way 16 by the EHO amendments to date? 17 A No. 18 Q And, again, it's your understanding that 19 if you wanted to, you could remove a tree, for 20 example, on your property or maybe make some 21 alterations to your home; is that correct? 22 A Yes.</p>	<p style="text-align: right;">Page 43</p> <p>1 Q And is it your understanding that EHO 2 permits still need to comply with other regulations, 3 including, for example, the building codes and land -- 4 and obtain land disturbance permits? 5 MS. COUSLER: Objection. Legal conclusion 6 and foundation. 7 THE COURT: Sustained. 8 9 BY MR. STARKS: 10 Q So you're not aware of any regulations 11 that might require, for example, a land disturbance 12 permit for construction in your neighborhood or in 13 Arlington? 14 MS. COUSLER: Same objection. 15 THE COURT: Sustained. 16 MR. STARKS: I'm just asking whether she's 17 aware of anything. 18 THE COURT: That has no probative value 19 considering that it's requiring either a legal 20 conclusion or an expert opinion. 21 MR. STARKS: Well, she testified to her 22 knowledge how the -- the amendment itself, Your</p>

<p style="text-align: right;">Page 44</p> <p>1 Honor, so I'm just asking if she knows about any</p> <p>2 other regulations in the county.</p> <p>3 THE COURT: I understand you're asking</p> <p>4 that. The objection is sustained.</p> <p>5 MR. STARKS: Understood.</p> <p>6</p> <p>7 BY MR. STARKS:</p> <p>8 Q Given that there have been EHOs approved</p> <p>9 but not built, isn't it fair to say that it's too</p> <p>10 early to determine how many EHOs will actually be</p> <p>11 generated and their distribution if some of the</p> <p>12 permits may never get built in your neighborhood?</p> <p>13 A Well, I have learned that Lyon Park has</p> <p>14 both R-6 and R-5 areas, which means that thirty-seven</p> <p>15 permits per year could be issued for Lyon Park.</p> <p>16 MR. STARKS: Your Honor, I just asked</p> <p>17 her -- I'm asking her to answer the question,</p> <p>18 which is --</p> <p>19 THE COURT: Yes. Please listen carefully</p> <p>20 to the question and answer the question put to</p> <p>21 you.</p> <p>22</p>	<p style="text-align: right;">Page 46</p> <p>1 Q I just want to ask you a little bit about</p> <p>2 some other development that's been going on in your</p> <p>3 neighborhood. And I believe that you testified</p> <p>4 earlier about that there were no, quote, McMansions,</p> <p>5 unquote?</p> <p>6 A I said --</p> <p>7 Q Is that correct?</p> <p>8 A I believe I said that there are no</p> <p>9 McMansions on my block, and that is correct.</p> <p>10 Q And how would you characterize a</p> <p>11 McMansion?</p> <p>12 A A house that is larger than the house that</p> <p>13 it replaced both in square footage, like on the main</p> <p>14 level, and also that is higher than the house that it</p> <p>15 replaced, taller than the house that it replaced, or</p> <p>16 that has multiple buildings where there was previously</p> <p>17 only one building.</p> <p>18 Q Thank you. I would like to present</p> <p>19 Defendants' Exhibit 330. Ms. Fibel, do you know what</p> <p>20 this document is?</p> <p>21 A Yes. It looks like a message from Dan</p> <p>22 Credon to me and from me -- it starts with one from</p>
<p style="text-align: right;">Page 45</p> <p>1 BY MR. STARKS:</p> <p>2 Q Isn't it fair to say that it's too early</p> <p>3 to determine how many EHOs will actually be built if</p> <p>4 some of the permits are approved but they haven't been</p> <p>5 built to date? In other words, given that a permit</p> <p>6 may be approved in and of itself is not dispositive of</p> <p>7 whether the EHO will actually get built. Isn't that</p> <p>8 correct?</p> <p>9 A It is correct that the fact that someone</p> <p>10 has received an EHO permit does not necessarily mean</p> <p>11 that they would build what the permit permits them to</p> <p>12 build.</p> <p>13 Q The traffic issues that you mentioned</p> <p>14 earlier, is there any way for you to know whether or</p> <p>15 not those are actually attributed to EHO development?</p> <p>16 A Well, since there's been no EHO</p> <p>17 development, I can't say that they are due to EHO</p> <p>18 development.</p> <p>19 Q And the same for your testimony regarding</p> <p>20 sewer backups?</p> <p>21 A The sewer backups were not due to EHO</p> <p>22 development.</p>	<p style="text-align: right;">Page 47</p> <p>1 me to Dan.</p> <p>2 Q So it looks like -- is that your e-mail?</p> <p>3 MFibel002?</p> <p>4 A Yes.</p> <p>5 Q And it looks like you are sending a</p> <p>6 property that you found at 232 North Fillmore Street</p> <p>7 in Arlington, Virginia that was listed on Realtor.com;</p> <p>8 is that correct?</p> <p>9 A Yes.</p> <p>10 Q And is that in your neighborhood?</p> <p>11 A Yes. It's in Lyon Park.</p> <p>12 Q It's in Lyon Park?</p> <p>13 A Uh-huh.</p> <p>14 Q And you say, Hi, Dan. This house is one</p> <p>15 down from 2909 2nd Road where the three townhouses are</p> <p>16 proposed. It's on a very large lot, 15k square feet,</p> <p>17 \$2,995,000. Margaret.</p> <p>18 Why were you sending this to Mr. Credon?</p> <p>19 A We hadn't had correspondence about what</p> <p>20 was happening, especially near 2909 2nd Road.</p> <p>21 Q And is it correct -- is it your</p> <p>22 understanding that this is a single-family home that</p>

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1 you're sending here?

2 A Yes. Uh-huh. It's a single-family home.

3 Q So was it the case that there was an

4 existing home on that property that was torn down and

5 replaced with a single-family home?

6 A You know, I can't remember about the

7 history of this property. There were -- I think that

8 this is the one that was just enlarged. I don't quite

9 remember.

10 Q So it was enlarged to seven bedrooms and

11 six bathrooms with 6,170 square feet?

12 A I think that that's a fair assessment. I

13 don't remember that it's a brand-new house.

14 Q Is that bigger than most of the houses

15 currently on your street?

16 A Well, this house is not on my street, and

17 it is bigger than the houses on my block.

18 Q What about elsewhere in Lyon Park?

19 A I would say my block and the block next to

20 me. I can't go further than that.

21 Q So have you noticed perhaps a trend of

22 larger homes being built within Lyon Park? Either

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1 being built or expanded, as you state, similar to this

2 home at 232 North Fillmore Street?

3 A I don't think that there's anything else

4 that is this large, but there are homes that are being

5 enlarged and some teardowns that are being -- the new

6 ones are larger than what was there previously.

7 Q But they're not being replaced with EHO?

8 A Since there have been no EHO buildings

9 constructed, they are not larger than EHO.

10 Q Well, they're not EHO?

11 A They're not EHO, yeah.

12 Q Right. And so in response, Mr. Creedon

13 states, Margaret, in looking at this property, I

14 speculate you are safe from a Missing Middle Housing

15 type property. This looks like a very modern

16 building, seven bedrooms, et cetera.

17 Do you have any idea why he would respond

18 that way?

19 A No.

20 Q That you are safe from a Missing Middle

21 Housing type property?

22 MS. COUSLER: Objection, Your Honor.

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1 Calls for speculation about what Dan Creedon was

2 thinking about.

3 THE COURT: Objection overruled. She can

4 answer that question.

5 THE WITNESS: I don't know why he would

6 have said that.

7

8 BY MR. STARKS:

9 Q What do you interpret it to be?

10 MS. COUSLER: Objection, Your Honor.

11 Hearsay.

12 THE COURT: Your objection is now

13 sustained.

14 MR. STARKS: This is a stipulated exhibit,

15 Your Honor. They stipulated to the admissibility

16 of this exhibit, so its contents are -- can come

17 in, and I'm just asking her -- and we can keep

18 going because she responds.

19

20 BY MR. STARKS:

21 Q Ms. Fibel, you wrote in response to that,

22 The original house was built in 1922 and has been

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1 enlarged over the years. It may be one of the houses

2 that had a tree fall on it during Hurricane Isabel. I

3 can't quite remember. My take on the house coming on

4 the market is that people who can get out of the

5 neighborhood are jumping ship.

6 What do you mean by all that?

7 A Which part?

8 Q Well, I guess this statement that, My take

9 on this house, the 232 North Fillmore Street, coming

10 on the market is that people who can get out of the

11 neighborhood are jumping ship.

12 A I think that my response was that people

13 who have large properties are thinking about selling

14 them so that they're not here when a sixplex is built

15 next to them.

16 Q But it's not a sixplex that's being built.

17 It's a single-family home; isn't that right? This

18 house is a single-family home?

19 A Yeah. I said, Built next to them.

20 Q Okay. But isn't it the case that the

21 people who are selling their homes, the homes are

22 being replaced, at least in this example, by a single-

<p style="text-align: right;">Page 52</p> <p>1 family home?</p> <p>2 A So this wasn't a replacement. As I said</p> <p>3 in the first paragraph and as I said to you before,</p> <p>4 it's a house that's been --</p> <p>5 Q Enlarged?</p> <p>6 A Yes.</p> <p>7 Q How did you meet Mr. Creedon?</p> <p>8 A We had correspondence -- I -- through the</p> <p>9 architect that I worked with on projects on my house,</p> <p>10 I knew that there might be a suit, and I said, You can</p> <p>11 give my name to whoever is working on that, and -- and</p> <p>12 I didn't know that Dan was the first person. Dan may</p> <p>13 have been the first person who contacted me about it.</p> <p>14 Q About a lawsuit?</p> <p>15 A Yes.</p> <p>16 Q All right. I'd like to circulate</p> <p>17 Defendants' Exhibit 225. Do you recognize this</p> <p>18 document, Ms. Fibel?</p> <p>19 A I do.</p> <p>20 Q And what is it?</p> <p>21 A It's an e-mail that I sent to Dan and to</p> <p>22 somebody else who was involved in the early</p>	<p style="text-align: right;">Page 54</p> <p>1 BY MR. STARKS:</p> <p>2 Q Do you recognize this document, Ms. Fibel?</p> <p>3 A Yes.</p> <p>4 MS. COUSLER: I'm going to object to</p> <p>5 relevance. This whole line of questioning about</p> <p>6 the litigation and who was a plaintiff and who</p> <p>7 was not I don't think is relevant to the case at</p> <p>8 hand.</p> <p>9 MR. STARKS: Your Honor, again, these two</p> <p>10 exhibits have been stipulated to by the</p> <p>11 plaintiffs.</p> <p>12 MS. COUSLER: The relevance is always an</p> <p>13 objection, Your Honor, under the scheduling order</p> <p>14 I believe.</p> <p>15 MR. STARKS: Yeah. The admissibility here</p> <p>16 was stipulated to, Your Honor, so both of</p> <p>17 these --</p> <p>18 THE COURT: Let me look at it.</p> <p>19 Why is this relevant?</p> <p>20 MR. STARKS: Well, Your Honor, in the</p> <p>21 e-mail Ms. Fibel writes, I'm fine if they have</p> <p>22 found someone whose house is more threatened than</p>
<p style="text-align: right;">Page 53</p> <p>1 discussions, Wally Christensen, and it was just, you</p> <p>2 know, kind of an offhanded remark thinking that if</p> <p>3 there were a --</p> <p>4 MS. COUSLER: Objection, Your Honor.</p> <p>5 Outside the scope of the direct.</p> <p>6 THE COURT: Overruled.</p> <p>7 THE WITNESS: That if there were a charge</p> <p>8 for getting the EHO permit, that we could apply</p> <p>9 for EHO permits.</p> <p>10</p> <p>11 BY MR. STARKS:</p> <p>12 Q And so at this time when you sent this</p> <p>13 e-mail, was there a group of folks who you had been</p> <p>14 speaking with about maybe, I guess, either getting</p> <p>15 involved in the lawsuit or challenging the EHO</p> <p>16 amendment?</p> <p>17 MS. COUSLER: Objection, Your Honor.</p> <p>18 Relevance.</p> <p>19 THE COURT: We are outside the scope at</p> <p>20 this point. The objection is sustained.</p> <p>21 MR. STARKS: All right. Well, maybe the</p> <p>22 next exhibit will help. This is Defense 329.</p>	<p style="text-align: right;">Page 55</p> <p>1 mine, and I'm wondering what the basis for that</p> <p>2 statement is.</p> <p>3 THE COURT: Why is that relevant?</p> <p>4 MR. STARKS: Well, it's relevant because</p> <p>5 it goes to standing. If she's not threatened by</p> <p>6 the EHO amendments, then it's possible that she</p> <p>7 wouldn't have standing in this case.</p> <p>8 THE COURT: What's your response to that?</p> <p>9 MS. COUSLER: I think it's a</p> <p>10 characterization of the e-mail. More threatened</p> <p>11 in my mind doesn't mean not threatened, and so I</p> <p>12 think the idea that she wouldn't have standing</p> <p>13 based on this e-mail, it doesn't have any import</p> <p>14 because it's a question of degree, not a question</p> <p>15 of --</p> <p>16 MR. STARKS: But that's exactly why we're</p> <p>17 here to cross-examine the witness, Your Honor.</p> <p>18 It's a degree.</p> <p>19 THE COURT: Your objection is overruled.</p> <p>20 You may proceed.</p>

<p style="text-align: right;">Page 56</p> <p>1 BY MR. STARKS:</p> <p>2 Q So what did you mean by that? I'm curious</p> <p>3 if they found someone's house who's more threatened --</p> <p>4 sorry. I'm fine if they have found someone's house</p> <p>5 who's more threatened than mine.</p> <p>6 What did you mean by that statement?</p> <p>7 A Threatening might not have been a good</p> <p>8 choice of words, but more affected than mine. More</p> <p>9 likely affected than mine. I do have concerns that</p> <p>10 there are four rental houses on my square block and</p> <p>11 those seem to me the most likely kinds of houses that</p> <p>12 would be turned over to an EHO developer, sold to an</p> <p>13 EHO developer.</p> <p>14 MR. STARKS: Okay. Well, I'd like to move</p> <p>15 this exhibit into evidence, Your Honor.</p> <p>16 Defendants' 329.</p> <p>17 THE COURT: Defendants' 329, hearing --</p> <p>18 any objection?</p> <p>19 MS. COUSLER: Just the -- the objection in</p> <p>20 general.</p> <p>21 THE COURT: Defendants' 329 shall be</p> <p>22 admitted into evidence.</p>	<p style="text-align: right;">Page 58</p> <p>1 Where did you learn the information about those</p> <p>2 properties?</p> <p>3 A Through the Arlington County property</p> <p>4 search site.</p> <p>5 Q And what did you learn about those</p> <p>6 properties?</p> <p>7 A I learned that those two properties have</p> <p>8 been divided -- each have been divided into four lots,</p> <p>9 which would be the precursor to building townhouses.</p> <p>10 Q What about your current situation -- I</p> <p>11 mean, the defense referenced parking. None of this</p> <p>12 has been caused by EHO development yet, but what about</p> <p>13 your current situation makes you think that EHO</p> <p>14 development will affect you more than the current</p> <p>15 single-family development in the neighborhood?</p> <p>16 A I'm sorry. Could you ask that one more</p> <p>17 time, please.</p> <p>18 Q Yes. What, if anything, about your</p> <p>19 current situation -- parking, tree canopy, any of the</p> <p>20 concerns you've identified -- makes you think that the</p> <p>21 EHO development, potential EHO development in the</p> <p>22 future will cause greater harm than single-family</p>
<p style="text-align: right;">Page 57</p> <p>1 (Marked in evidence by the court as</p> <p>2 Defendants' Exhibit Number 329.)</p> <p>3 MR. STARKS: No further questions.</p> <p>4 THE COURT: Redirect?</p> <p>5</p> <p>6 REDIRECT EXAMINATION</p> <p>7</p> <p>8 BY MS. COUSLER:</p> <p>9 Q Ms. Fibel, just a couple of questions.</p> <p>10 What, if anything, makes you think that EHO permits</p> <p>11 will get developed in Lyon Park?</p> <p>12 A Well, the -- of the four, which is Lyon</p> <p>13 Park and Ashton Heights, that -- where the permits</p> <p>14 have been issued, developers paid for those</p> <p>15 properties. In one instance, 290 -- actually, in two</p> <p>16 instances, 2909 2nd Road and 629 North Monroe Street,</p> <p>17 I have learned that --</p> <p>18 MR. STARKS: Objection. Foundation.</p> <p>19 THE COURT: Objection sustained.</p> <p>20</p> <p>21 BY MS. COUSLER:</p> <p>22 Q You said you learned about the permits.</p>	<p style="text-align: right;">Page 59</p> <p>1 development in the neighborhood?</p> <p>2 A I have learned more about what the</p> <p>3 general -- what the -- the way in which Arlington</p> <p>4 County does its long-term planning, and that is</p> <p>5 partially through the GLUP, General Land Use Plan, and</p> <p>6 that has information about how many dwellings per acre</p> <p>7 the county is planning for, and I learned by looking</p> <p>8 at the calculations for my street -- well, for my</p> <p>9 street for a couple different scenarios, that multiple</p> <p>10 scenarios would take the number of dwellings outside</p> <p>11 of what the planning has been done for.</p> <p>12 MR. STARKS: Objection. Foundation.</p> <p>13 THE COURT: Sustained.</p> <p>14</p> <p>15 BY MS. COUSLER:</p> <p>16 Q How did you acquire this information about</p> <p>17 the lot configurations and density?</p> <p>18 A Well, the information is -- about the lots</p> <p>19 is from the Arlington County website that --</p> <p>20 THE COURT: I don't think the witness --</p> <p>21 excuse me, ma'am. I'm sorry to interrupt you.</p> <p>22 I don't think the witness is answering</p>

<p style="text-align: right;">Page 60</p> <p>1 your first question. Would you ask it again? 2 Listen carefully to the question and 3 answer the question. 4 5 BY MS. COUSLER: 6 Q You had started to describe how many -- 7 how many -- how much density there would be on 8 specific lots. How did you come to acquire that 9 information? 10 THE COURT: No, that's not what I'm 11 getting at. The question was something along the 12 lines of, How do you think future EHO development 13 will affect your house? 14 15 BY MS. COUSLER: 16 Q How do you think future EHO development 17 will affect your house? 18 A Well, if either or both of the two rental 19 units are sold to developers and a sixplex is put up 20 or a -- or three townhouses are put up, I think that 21 that will affect my house. Those houses are -- well, 22 the brick house next to me is on the same sewer line.</p>	<p style="text-align: right;">Page 62</p> <p>1 much. You may step down. You can leave 2 everything there. 3 Counsel, I have Defendants' 330 and 4 Defendants' 225. I don't believe those are 5 entered into evidence. 6 MR. STARKS: Oh, Your Honor, I thought 7 that we had -- they were stipulated to as 8 admitted. If we didn't move, I'd ask -- 9 THE COURT: They may be. 10 MR. SULLIVAN: They were on the list of 11 documents that were stipulated to authenticity 12 and admissibility, so it's possible we didn't 13 move their admission. 14 THE COURT: Is it stipulated that they are 15 admitted? 16 MR. SULLIVAN: Well, it wasn't stipulated 17 that they were admitted, but it was stipulated -- 18 THE COURT: Are you moving to admit them 19 now? 20 MR. STARKS: I would move to admit them, 21 yes. 22 THE COURT: Is there any objection?</p>
<p style="text-align: right;">Page 61</p> <p>1 The house on Irving Street is on a 6,001 square foot 2 lot and so -- 3 MR. STARKS: Objection. Foundation. 4 THE COURT: Overruled. You may continue 5 to answer the question. 6 THE WITNESS: So I would expect to have 7 more runoff, especially from the smaller lot. 8 There is a foot -- 9 MR. STARKS: This would call for expert 10 opinion testimony, Your Honor, that she's not 11 qualified to give. 12 THE COURT: The objection is sustained. A 13 simple answer is what we're looking for here. So 14 is there anything else you'd like to add as to 15 how EHO affects your land, your house? We're not 16 looking for a technical answer. 17 THE WITNESS: It will bring more people to 18 my -- to the -- the houses with whom I share a 19 property line. 20 MS. COUSLER: No further questions, Your 21 Honor. 22 THE COURT: Thank you. Thank you very</p>	<p style="text-align: right;">Page 63</p> <p>1 MR. HAMPSHIRE: Your Honor, I think our 2 understanding on the admissibility was that we 3 were not necessarily waiving objections to 4 hearsay, so that's why we -- or relevance. But 5 if that's the case -- we have no objection if 6 that's the agreement so -- 7 THE COURT: Well, I don't know what the 8 agreement is. I'm asking you. 9 MR. SULLIVAN: The stipulation, Your 10 Honor -- and this is -- the list was -- and this 11 was handed up and it's been filed, but it goes in 12 this order. Paragraph 1 is a list of -- The 13 parties stipulate that the following documents 14 from Plaintiffs' exhibit list are authentic and 15 admissible, and it lists the plaintiffs' exhibits 16 that are so stipulated. And then -- 17 THE COURT: Does that list Defendants' 225 18 and -- 19 MR. SULLIVAN: So I'm getting to that, 20 because it's just the structure that's -- 21 basically, there's a separation. 22 THE COURT: I see.</p>

<p style="text-align: right;">Page 64</p> <p>1 MR. SULLIVAN: There are some documents 2 where authenticity and admissibility has been 3 stipulated to for the plaintiffs. Same -- 4 there's two lists for the defense. Both of those 5 appear on the list for the defense in which it 6 was a stipulation that they are both authentic 7 and admissible, so we would move for their 8 admission at this time. 9 THE COURT: All right. They will be 10 admitted. Defendants' 225 and Defendants' 330. 11 (Marked in evidence by the court as 12 Defendants' Exhibit Numbers 225 and 330.) 13 THE COURT: Next witness, please. 14 MR. HAMPSHIRE: It will be Elizabeth 15 Thurber. 16 (Ms. Thurber was sworn.) 17 18 -----oOo----- 19 20 21 22</p>	<p style="text-align: right;">Page 66</p> <p>1 A Yes. 2 Q All right. And what exactly does your 3 branch of that department, DES, do? The Office of 4 Sustainability? 5 A We have two major areas of work. One is 6 about energy conservation, greenhouse gas emissions. 7 I don't have much to do with that, but then the other 8 side of our group is stormwater, whether it be water 9 quality or conveyance. 10 Q And that's -- and is that your department? 11 The stormwater and conveyance? 12 A Yeah. I work on the gray, the so-called 13 gray infrastructure, which are the pipelines, those 14 kind of things. 15 Q Why is it called gray? 16 A Because it's mostly concrete. 17 Q I see. And what are the other divisions 18 within DES aside from the Office of Sustainability? 19 A Well, we have the operating section for 20 the stormwater, the water, sewer, streets. We have -- 21 let's see. We have water pollution control. We have 22 the sanitary sewer people. We have the utilities,</p>
<p style="text-align: right;">Page 65</p> <p>1 ELIZABETH LYNN THURBER, 2 called as a witness on behalf of the plaintiffs, 3 having been first duly sworn, was examined and 4 testified as follows: 5 6 DIRECT EXAMINATION 7 8 BY MR. HAMPSHIRE: 9 Q Ms. Thurber, nice to see you again. Would 10 you state your name for the record. 11 A My name is Elizabeth Lynn Thurber. 12 Q And are you an employee of Arlington 13 County? 14 A Yes. 15 Q And what is your position with Arlington 16 County? 17 A I am the stormwater infrastructure program 18 manager, and that's located within the Office of 19 Sustainability and Environmental Management, which is 20 part of the Department of Environmental Services. 21 Q All right. Does that department go by 22 DES?</p>	<p style="text-align: right;">Page 67</p> <p>1 which would be the water and the sanitary. There's 2 lots of different groups. There's about 800 people 3 that work in DES. 4 Q And what is your professional background? 5 Are you an engineer? 6 A Yeah. I'm a professional civil engineer, 7 uh-huh. 8 Q What did you do before you came to 9 Arlington County? 10 A I was self-employed in my own firm with my 11 husband, who was a land surveyor, and I was the civil 12 engineer in a small land development surveying 13 company. 14 Q Now, does DES in general in the Office of 15 Sustainability in particular review development 16 proposals or other materials that come from the Office 17 of Community Development? 18 A If it's -- yes, we review things -- 19 policies, documents, plans that would have an impact 20 on stormwater. 21 Q How does that process work? 22 A It depends on what it is that comes</p>

<p style="text-align: right;">Page 68</p> <p>1 through, but typically somebody -- you know, it 2 depends on exactly what they're doing, but somebody 3 somewhere figures out they need to look at the 4 stormwater master plan, they need to check it out with 5 the stormwater section, and then we get invited to the 6 various meetings and the documents get shared with us 7 and then we become part of that process, but not 8 everything they do comes through stormwater. 9 Q Is there any rhyme or reason as to which 10 come to you and which do not to the Office of 11 Sustainability? 12 A Yeah. It would have to deal with 13 something to do with the stormwater conveyance system, 14 the streams, environmental water quality or water 15 pollution control, something like that. Sometimes 16 they come through and we look at it and we're like, 17 This doesn't really impact us very much, so we don't 18 comment or have very minimal comments. 19 Q And do I understand then correctly that 20 it's not every development proposal that you see but 21 only those that impact the gray infrastructure? 22 MR. SULLIVAN: Can I just object to the</p>	<p style="text-align: right;">Page 70</p> <p>1 comments in a PDF, or we can -- there might be a Word 2 document that we comment on. And, again, sometimes 3 it's via e-mail. 4 Q Okay. Do you have an understanding of 5 what the Missing Middle Housing study was? Do you 6 recall that? 7 A Yeah. I have a vague understanding of it. 8 You know, it's not -- it wasn't one of the things that 9 I initiated, but it -- yeah, it came through and we 10 extensively commented on it. 11 Q And about when did that happen? 12 A My recollection is about a year to two 13 years ago. 14 Q Would March of 2022 sound right to you? 15 A Yeah. 16 Q All right. And what do you recall, if 17 anything, about the document that you've reviewed with 18 respect to the Missing Middle Housing study? 19 MR. SULLIVAN: Objection to foundation. 20 MR. HAMPSHIRE: Well, I think she 21 testified that she reviewed this document, and I 22 can ask her what she remembered.</p>
<p style="text-align: right;">Page 69</p> <p>1 leading nature of these questions? It's 2 characterizing testimony. 3 THE COURT: It is leading. Sustained. 4 5 BY MR. HAMPSHIRE: 6 Q Which development proposals do you see? 7 MR. SULLIVAN: Could I just object to the 8 vagueness of, Development proposals? 9 10 BY MR. HAMPSHIRE: 11 Q With respect to land use applications -- 12 do you understand what I've referred to as land use 13 applications? Rezonings, special use permit 14 applications, site plans, et cetera? Do you see 15 those? 16 A Some of them. 17 Q All right. And how do you make your 18 comments on those that come to you? How does that 19 work? 20 A Sometimes we might send e-mails, we might 21 call on the phone. Typically, they'd be e-mails, or 22 we'd comment on the actual documents. We can put</p>	<p style="text-align: right;">Page 71</p> <p>1 MR. SULLIVAN: I don't think there's a 2 document that's been identified. 3 THE WITNESS: Yeah. Which document? 4 MR. SULLIVAN: I just want to make sure 5 we're talking about something concrete. 6 THE COURT: The objection is sustained. 7 8 BY MR. HAMPSHIRE: 9 Q Ms. Thurber, you have a notebook in front 10 of you, and I'm asking you to look at Notebook Number 11 4 of 9. And my assistant can help you. 12 A 2 of 9. 13 Q Maybe over your left shoulder there. 14 A Oh, I'm sorry. 4. Okay. 15 Q All right. And I'm asking you to turn to 16 Tab 136. 17 A Which one? 18 Q 136. 19 A Okay. 136. Okay. 20 Q All right. And my question to you is, Do 21 you recognize this document and do you see your name 22 at the bottom there? I'm directing your attention to</p>

<p>1 the bottom of the page with the date of March 17, 2 2022.</p> <p>3 A Okay. There's two documents. There's one 4 on the top from Demetra McBride, but are you asking me 5 about the one from Elizabeth Thurber? From me?</p> <p>6 Q Yes, ma'am. Right. And you'll see the 7 subject there, MMHS: Preliminary Recommendations For 8 Staff Review.</p> <p>9 A Right. And I recall the document, yeah.</p> <p>10 Q All right. Is that the document to which 11 you were referring earlier?</p> <p>12 A Yes. It would have been -- yeah. They 13 sent us -- these are apparently -- MMH is the Missing 14 Middle Housing study preliminary recommendations for 15 staff review, so we commented on a document that was 16 shared.</p> <p>17 Q All right. And if you turn the page, 18 you'll -- to the next page and it has a Bates stamp 19 down at the bottom of 11504. Do you see that?</p> <p>20 A Yes.</p> <p>21 Q And do you see the e-mail dated March 17, 22 2022 from Jason Papacosma to a bunch of people,</p>	Page 72	<p>1 this is going to be devastating to the already 2 stressed stormwater conveyance system. The issue is 3 not just what will happen in flood inundation zones, 4 but that the areas that drain to those zones also 5 contribute to the flow of stormwater into the 6 inundation zones. Areas that are not problematic now 7 will become problematic because the available land for 8 overland relief shrinks, there are no protections for 9 setback from existing stormwater drainage pipe 10 networks, and problems with lot to lot grading/ 11 drainage will be harder to address and will be 12 magnified. I am not advocating that we continue with 13 business as usual, but this document does not begin to 14 address the storm conveyance system impacts or the 15 need for overland relief pathways.</p> <p>16 Do you remember writing that?</p> <p>17 A Yes.</p> <p>18 Q Okay. And what caused you to write that? 19 What caused you to write that paragraph there? What 20 were you responding to?</p> <p>21 A Well, the document that we were reviewing 22 didn't have any of the concerns that are enumerated</p>	Page 74
<p>1 including you?</p> <p>2 A I see two e-mails that say that, yes. 3 Okay.</p> <p>4 Q Well, this is the one down at the bottom 5 of that Page 504. And do you see the subject line 6 there that says, MMHS: Preliminary Recommendations 7 for Staff Review?</p> <p>8 A Sure. Yes, I see it.</p> <p>9 Q All right. And do you see where -- by the 10 way, who is Jason Papacosma?</p> <p>11 A Jason works in the same bureau that I 12 work, The Office of Sustainability and Environmental 13 Management. He is the person who handles the water 14 quality side of stormwater. He is that program 15 manager.</p> <p>16 Q Okay. All right. And do you recall 17 receiving the MMHS preliminary recommendations for 18 staff review from Jason?</p> <p>19 A Yes. I mean, yeah.</p> <p>20 Q All right. And if you turn back -- back 21 to the first page that we were on, and you say in that 22 e-mail, I cannot state in strong enough words that</p>	Page 73	<p>1 here so -- and I believe at that time they were 2 proposing setbacks that were different and some items, 3 like, maybe increased lot coverage at the time. There 4 was different -- it just didn't address my concerns.</p> <p>5 Q Okay.</p> <p>6 A And I outlined my concerns here in the 7 e-mail.</p> <p>8 Q Do you recall whether or not you received 9 a response to these concerns?</p> <p>10 A Well, we would have discussed them and 11 probably traded e-mails and then there were some 12 meetings about it.</p> <p>13 Q Well, I'm not asking to -- I'm just asking 14 if you can recall. Do you recall if there were 15 meetings about it?</p> <p>16 A Oh, I recall some meetings, yes.</p> <p>17 Q Do you remember in general what was 18 discussed? I'm not asking you to repeat statements 19 out of court, but what was your understanding of the 20 comments sitting here now?</p> <p>21 A So, of course, I had to explain my 22 comments to people who don't work in stormwater,</p>	Page 75

<p style="text-align: right;">Page 76</p> <p>1 right? They wouldn't understand why I might say these 2 things, so I would have to maybe explain it, give 3 examples, that kind of thing. 4 MR. SULLIVAN: Let me just object to the 5 foundation of articulating who was participating 6 in these meetings. A little bit more context for 7 the testimony, Your Honor. 8 THE COURT: The objection is overruled. 9 MR. HAMPSHIRE: Your Honor, this is on the 10 stipulated list as to admissibility as well, so 11 we'd like to move the admission of 136. 12 MR. SULLIVAN: No objection. 13 THE COURT: Plaintiffs' 136 shall be 14 admitted into evidence. 15 (Marked in evidence by the court as 16 Plaintiffs' Exhibit Number 136.) 17 18 BY MR. HAMPSHIRE: 19 Q So who was in the various meetings to 20 which you refer? 21 A I have to be honest, I can't recall every 22 single meeting and who was there, but I'm sure some of</p>	<p style="text-align: right;">Page 78</p> <p>1 in the middle of the page from you to Jason Papacosma 2 and others dated March 28th, 2022. And do you 3 remember writing that e-mail? 4 A I do. 5 MR. HAMPSHIRE: Okay. Your Honor, this is 6 also on the stipulated exhibit list for 7 admissibility, and I'd like to move it into 8 evidence at this time. 9 MR. SULLIVAN: No objection. 10 THE COURT: Plaintiffs' 137 shall be 11 admitted into evidence. 12 (Marked in evidence by the court as 13 Plaintiffs' Exhibit Number 137.) 14 15 BY MR. HAMPSHIRE: 16 Q And just briefly, Ms. Thurber, I'd like 17 you to turn to Tab 133 and 134, which, Your Honor, we 18 have agreed that on the stipulated list would be 19 introduced together. And pursuant to that 20 stipulation, we have done so because based upon an 21 agreement that 134 is the e-mail that transmits 133. 22 Ms. Thurber, do you -- do you recognize</p>
<p style="text-align: right;">Page 77</p> <p>1 the people on the list here would have been there. 2 Qianqian was there. Luis Araya was in some of them. 3 I don't have my whole schedule out in front of me who 4 were in what meetings when, but, generally speaking, 5 it's the people on this e-mail chain and probably some 6 of the people from the planning department that were 7 proposing the changes. 8 Q And I'm not sure I -- if you gave me an 9 answer, I don't recall it. My question to you was, 10 What, if any, response did you get to the concerns 11 that you outlined here on Plaintiffs' 136 at the 12 bottom? 13 A Well, I mean, they would have -- there 14 were people who felt that these were not significant 15 concerns. For instance, that they could be managed by 16 some adjustments perhaps to the document, et cetera. 17 So there was just discussion about all these kind of 18 concerns that I had and, you know, what could be done 19 about it or not. I don't remember every single 20 conversation that we would have had. 21 Q I would ask you to turn to the next tab, 22 which is 137, and direct your attention to the e-mail</p>	<p style="text-align: right;">Page 79</p> <p>1 the document I'm showing you? I'm asking you to look 2 at Tab 134. 3 A 134? 4 Q 134. Right. 5 A Okay. 6 Q And you'll see there's an e-mail there -- 7 several e-mails, but you'll see the one that's from 8 Jason Papacosma dated March 21, 2022. 9 A Uh-huh. 10 Q And you'll see there's an embedded Word 11 doc, which says, DES Land Development and 12 Infrastructure Concerns. Do you see that? 13 A Yes. A Word document? Uh-huh. 14 Q Yes. Uh-huh. Do you have any 15 recollection of that Word document? The DES 16 infrastructure concerns? 17 A Well, vaguely. You know, as we work this 18 process, people were trying to kick around different 19 ideas of what might be done to approve the document, 20 and that's what this would have been. 21 Q You'll see that Jason says to you and 22 others, Greg and team to facilitate the next internal</p>

<p style="text-align: right;">Page 80</p> <p>1 conversations around MM. I set up a shared document 2 to collaborate and capture DES concerns and 3 recommendations building on today's conversation with 4 CPHD. What is CPHD? Do you know? Do you have any 5 understanding? 6 A Community Planning Housing and 7 Development. 8 Q Gotcha. Okay. Please -- and he goes on 9 to say -- you'll see the embedded document. He goes 10 on to say, Please dive in and update -- excuse me -- 11 dive and add, slash, update, slash, improve. I'd say 12 our first priority is capturing the concerns and then 13 refining, slash, iterating the recommendations, et 14 cetera. 15 Do you have any recollection of that? 16 A I remember that we summarized our concerns 17 and made some requested, you know, recommendations. 18 Q All right. And then if you turn to Tab 19 133. 20 A Uh-huh. 21 Q Do you recognize this document? This 22 three-page document here?</p>	<p style="text-align: right;">Page 82</p> <p>1 in the comment bubble. I think one of the problems is 2 that the proposal is for MM to be by-right without any 3 protections or regulations of adverse stormwater 4 impacts. All stormwater measures or policies or 5 options are voluntary under current proposals. Then 6 once the MM is by-right, it will be impossible to 7 impose any regulations to prevent adverse stormwater 8 impacts, which may be quite severe in certain 9 locations, parens, but not all, closed parens. So we 10 need to include requirements to prevent adverse 11 stormwater impacts along with or before MM becomes by- 12 right. After it's by-right, there will never be any 13 way to prevent adverse stormwater impacts and they 14 will amplify and intensify. 15 Do you remember writing that? 16 A Yes. 17 Q And do you remember whether you got any 18 comments back or responses back to that comment? 19 A The way I recall it is that the approach 20 to this was going to be to the effect that we would 21 keep everything the same that's already by-right under 22 single-family zoning. It wouldn't be any different,</p>
<p style="text-align: right;">Page 81</p> <p>1 A I think it's the one that is embedded in 2 the other -- I think that's what that is. The one 3 that we had just talked about. 4 Q All right. The DES -- 5 A The one that Jason shared. 6 Q The DES Land Development and 7 Infrastructure Concern, which is a Word document 8 embedded on 134. You think that's what this is? 9 A I think that's what this is. 10 Q All right. And if you'd turn to 133, and 11 I'll direct your attention to the last page of 133. 12 A Uh-huh. 13 Q And do you see your name there? 14 A I'm still looking. 15 Q Sorry. 16 A You mean in the little pink box on the 17 side? 18 Q Yes. In the bubble. Yes. 19 A Okay. I see, Commented, Elizabeth 20 Thurber, meaning I would have commented. 21 Q Yes. Uh-huh. And I'm just going to read 22 this for the record. It says, Elizabeth Thurber3R2,</p>	<p style="text-align: right;">Page 83</p> <p>1 and, therefore, there would be -- there wouldn't be 2 these kind of problems. It would vindicate whatever 3 problems because it's already allowed by the single- 4 family zoning. They weren't going to change things 5 from what was allowed by single families, except for 6 the fact that there would be, you know, these expanded 7 housing -- what they would call Missing Middle Housing 8 options at the time. 9 Q Okay. And if you turn back to 136 that we 10 were looking at, directing your attention down at the 11 bottom of the e-mail that we were reading, and you 12 talk about, Areas that are not problematic now will 13 become problematic because the available land for 14 overland relief shrinks. 15 Did the things that you just discussed 16 address your concern with respect to overland relief? 17 A Well, I mean, I thought it should go 18 further than it eventually ended up. 19 Q And you continue on. There are no 20 protections for setback from existing stormwater 21 drainage pipe networks. 22 Did the response address that concern?</p>

<p>1 A No.</p> <p>2 Q And you continue. And the problems</p> <p>3 with --</p> <p>4 THE COURT: I'm sorry. Counsel, where are</p> <p>5 you?</p> <p>6 MR. HAMPSHIRE: I'm on the bottom of</p> <p>7 tab -- Exhibit 136. The e-mail dated March 17,</p> <p>8 2022.</p> <p>9 THE COURT: 136?</p> <p>10 MR. HAMPSHIRE: Yes, sir.</p> <p>11 THE COURT: And where are you on that</p> <p>12 page?</p> <p>13 MR. HAMPSHIRE: At the bottom of the page,</p> <p>14 sir. The e-mail dated March 17, 2022.</p> <p>15 THE COURT: Thank you.</p> <p>16</p> <p>17 BY MR. HAMPSHIRE:</p> <p>18 Q So I think you said that -- I can't recall</p> <p>19 your answer. You said that there are -- with respect</p> <p>20 to the language, there are no protections for setback</p> <p>21 from existing stormwater drainage pipe networks. My</p> <p>22 question was, What was the response to your comments</p>	<p>Page 84</p> <p>1 you, At the time, did it satisfy your concerns?</p> <p>2 A No.</p> <p>3 Q And why not?</p> <p>4 A As I stated, so I believe that there is</p> <p>5 qualitatively a difference between one family living</p> <p>6 in a particular building or size lot and multiple</p> <p>7 families living in that same space.</p> <p>8 Q And what -- and with respect to what you</p> <p>9 believed at the time, why -- what was significant</p> <p>10 about that, if anything? The number of families?</p> <p>11 A Why do I think -- I need to make sure I</p> <p>12 understand. Are you asking why I think the number of</p> <p>13 families impacts or is it something that's not the</p> <p>14 same as if it was just one family?</p> <p>15 Q Yes, ma'am.</p> <p>16 A Well, it means I have -- that people --</p> <p>17 when we do our work, we have more people to deal with.</p> <p>18 When we have to negotiate easements, whether they be</p> <p>19 temporary or permanent, we have more people to deal</p> <p>20 with, not less, not even the same. We have a lot more</p> <p>21 people to deal with, and that makes it harder for us</p> <p>22 to do what we do. For my team anyway.</p>
<p>Page 85</p> <p>1 on 134, the bubble? Did they address that concern?</p> <p>2 A Again, the approach was that, well,</p> <p>3 single-family homes can -- aren't required to setback,</p> <p>4 so why would we do it -- so if we keep everything the</p> <p>5 same in terms of lot coverage or footprint or</p> <p>6 something like setbacks, then it's no change from</p> <p>7 what's already permitted by-right; therefore, there</p> <p>8 would be no impact.</p> <p>9 Q Did you agree with that?</p> <p>10 A No, I don't agree with that.</p> <p>11 Q Why not?</p> <p>12 A Because --</p> <p>13 MR. SULLIVAN: Could I just object to the</p> <p>14 extent that she's offering opinions that she</p> <p>15 expressed at the time versus opinions that she</p> <p>16 holds today as being a distinction between</p> <p>17 testimony that would be permitted because she's</p> <p>18 not a designated expert by either party to offer</p> <p>19 an expert opinion.</p> <p>20</p> <p>21 BY MR. HAMPSHIRE:</p> <p>22 Q Let me clarify my question. I'm asking</p>	<p>Page 86</p> <p>1 you, At the time, did it satisfy your concerns?</p> <p>2 A No.</p> <p>3 Q And why not?</p> <p>4 A As I stated, so I believe that there is</p> <p>5 qualitatively a difference between one family living</p> <p>6 in a particular building or size lot and multiple</p> <p>7 families living in that same space.</p> <p>8 Q And what -- and with respect to what you</p> <p>9 believed at the time, why -- what was significant</p> <p>10 about that, if anything? The number of families?</p> <p>11 A Why do I think -- I need to make sure I</p> <p>12 understand. Are you asking why I think the number of</p> <p>13 families impacts or is it something that's not the</p> <p>14 same as if it was just one family?</p> <p>15 Q Yes, ma'am.</p> <p>16 A Well, it means I have -- that people --</p> <p>17 when we do our work, we have more people to deal with.</p> <p>18 When we have to negotiate easements, whether they be</p> <p>19 temporary or permanent, we have more people to deal</p> <p>20 with, not less, not even the same. We have a lot more</p> <p>21 people to deal with, and that makes it harder for us</p> <p>22 to do what we do. For my team anyway.</p> <p>Page 87</p> <p>1 Q Ms. Thurber, to your knowledge, were any</p> <p>2 of the comments that we've discussed here that you</p> <p>3 made or, for that matter -- well, let's start with</p> <p>4 those that you made that we discussed on Plaintiffs'</p> <p>5 136, 133, and 134 and 137. Were they -- to your</p> <p>6 knowledge, were those comments shared with the public</p> <p>7 outside the group that you e-mailed?</p> <p>8 MR. SULLIVAN: I'm going to object to</p> <p>9 foundation, speculation, and relevance. I'm</p> <p>10 happy to speak more on the relevance point, Your</p> <p>11 Honor. The discussion that's going on here is</p> <p>12 part of a study that is -- was conducted part of</p> <p>13 public records. So it's not clear to me what her</p> <p>14 knowledge of kind of what happened after the fact</p> <p>15 is going to be relevant to the case at all. The</p> <p>16 documents speak for themselves. They're part of</p> <p>17 the public record and part of the legislative</p> <p>18 consideration that's under review in this case.</p> <p>19 THE COURT: You say they're part of the</p> <p>20 public record. How are they part of the public</p> <p>21 record?</p> <p>22 MR. SULLIVAN: Well, they are public</p>

<p style="text-align: right;">Page 88</p> <p>1 records.</p> <p>2 THE COURT: And how are they accessed by</p> <p>3 the public?</p> <p>4 MR. SULLIVAN: Well, the -- the issue is</p> <p>5 the considerations that occurred are part of the</p> <p>6 deliberative process that's going on.</p> <p>7 THE COURT: Right. But they are not</p> <p>8 published anywhere. These e-mails wouldn't be</p> <p>9 published for some -- for the public.</p> <p>10 MR. SULLIVAN: Well, they're accessible in</p> <p>11 the same way that any other public record would</p> <p>12 be through the Freedom of Information Act and</p> <p>13 other requests.</p> <p>14 THE COURT: Right. Okay. I understand.</p> <p>15 Re-state your objection.</p> <p>16 MR. SULLIVAN: The objection is to the</p> <p>17 extent to which this is calling for -- it lacks</p> <p>18 foundation and it's speculation. There's no</p> <p>19 reason that this witness would know what was</p> <p>20 published publicly or not. And, second, that</p> <p>21 there's a relevance issue in that it tends to</p> <p>22 implicate that they should have been when they</p>	<p style="text-align: right;">Page 90</p> <p>1 available to the public is relevant for what</p> <p>2 count of your complaint?</p> <p>3 MR. HAMPSHIRE: Count 3. It goes to</p> <p>4 the --</p> <p>5 THE COURT: That is, The board failed to</p> <p>6 reasonably reconsider many of the factors. Why</p> <p>7 does the internal -- I'm not -- I'm talking about</p> <p>8 internal communications. Why is that relevant to</p> <p>9 that?</p> <p>10 MR. HAMPSHIRE: Because the statute says</p> <p>11 reasonable consideration not by staff but by the</p> <p>12 county board, and the county board -- and</p> <p>13 reasonableness, at least our theory of the case,</p> <p>14 has to be determined by whether or not it's</p> <p>15 the -- the deliberations are in the legislative</p> <p>16 record, whether the public has any chance to look</p> <p>17 at them, scrutinize them, and so forth. And, you</p> <p>18 know, the other difference is that the Freedom of</p> <p>19 Information Act requires an affirmative act by</p> <p>20 someone to go and also, in fact, make a payment</p> <p>21 for reasonable costs and whatnot, but our theory</p> <p>22 of the case is that reasonable consideration</p>
<p style="text-align: right;">Page 89</p> <p>1 were always subject to the Freedom of Information</p> <p>2 Act and public disclosure.</p> <p>3 THE COURT: Response?</p> <p>4 MR. HAMPSHIRE: Well, taking the second</p> <p>5 one first, Your Honor, the -- as you heard in my</p> <p>6 opening statement, our theory of the case is that</p> <p>7 for a study to be valid, it needs to be</p> <p>8 scrutinized by the public. It needs to be</p> <p>9 available for the public to review within</p> <p>10 reasonable consideration. That's what this goes</p> <p>11 to as to our theory of the case.</p> <p>12 With respect to foundation, I'm asking her</p> <p>13 if she knows basically whether her e-mails went</p> <p>14 out to anybody other than the team. That's all.</p> <p>15 And with respect to the record, a Freedom of</p> <p>16 Information Act request is always available, but</p> <p>17 that's a fundamentally different thing from</p> <p>18 whether it's part of the legislative record in</p> <p>19 this case, which is what is critical.</p> <p>20 MR. SULLIVAN: If I may respond?</p> <p>21 THE COURT: Well, whether the internal</p> <p>22 conversations between government agencies is</p>	<p style="text-align: right;">Page 91</p> <p>1 requires public scrutiny. It requires staff to</p> <p>2 show their work in the public sector, in the</p> <p>3 public forum for the public to know something</p> <p>4 about it.</p> <p>5 MR. SULLIVAN: Your Honor, I think that</p> <p>6 the -- our issue is merely with asking this</p> <p>7 witness -- it's sort of -- it's asking someone</p> <p>8 who would have no foundation to know what</p> <p>9 happened with particular e-mails after the fact,</p> <p>10 what happened to them to leave some implication</p> <p>11 that something that should have happened did not,</p> <p>12 and that is -- therefore, it lacks relevance.</p> <p>13 We do think that the staff considerations</p> <p>14 are part of the case and are relevant. It's just</p> <p>15 this idea -- and counsel brings this up. I think</p> <p>16 it's time we address it here. Their new theory</p> <p>17 of the case that there's not public disclosure is</p> <p>18 not in their complaint anywhere. The FOIA count</p> <p>19 they did bring has already been dismissed by the</p> <p>20 court, and we think they're trying to reinvent a</p> <p>21 new theory of the case on the fly, and that's</p> <p>22 just -- it's just -- it's just mucking things up</p>

<p style="text-align: right;">Page 92</p> <p>1 in terms of what the real standards are here, 2 which is, What did the staff and the board 3 consider? And that's the question under the 4 statute, so we think that should be the entire 5 focus of this discussion. 6 THE COURT: Thank you both. I will 7 sustain the objection on the ground of lack of 8 foundation. 9 10 BY MR. HAMPSHIRE: 11 Q Turning back to 137, Ms. Thurber, you 12 write there in the e-mail dated March 28th that -- 13 that the current proposal expands by-right zoning 14 without and before any requirement is made to analyze 15 and address stormwater impacts. 16 Was that concern addressed by the response 17 to your comments to 134 and 136? 18 A Well, the response was that -- again, that 19 they weren't -- we weren't -- the proposal wasn't 20 going to do anything different or expand anything 21 beyond what was already permitted by current single- 22 family-home zoning. And so my concern was not</p>	<p style="text-align: right;">Page 94</p> <p>1 admitted into evidence. 2 (Marked in evidence by the court as 3 Plaintiffs' Exhibit Number 153.) 4 5 BY MR. HAMPSHIRE: 6 Q Do you recognize this document, 7 Ms. Thurber? 8 A I don't remember this one in particular, 9 but clearly I'm on the e-mail list so -- 10 Q All right. It says -- I'll just read it 11 for the record. Up at the top, you'll see it's from 12 Demetra McBride. Would you tell the court who Demetra 13 McBride is? 14 A She's my supervisor. She's a bureau chief 15 for the Office of Sustainability and Environmental 16 Management. 17 Q Right. Do you recall whether or not she 18 agreed or disagreed with your views about the Missing 19 Middle Housing proposal you were commenting on? 20 A I don't know. I'm not going to speak for 21 Demetra. She's, of course, describing here that -- 22 the struggling with the stormwater system that has</p>
<p style="text-align: right;">Page 93</p> <p>1 something that other people shared, that this was the 2 same as what people can already build if they want to, 3 and, therefore, there's no -- there's no difference. 4 Q And do I understand correctly from your 5 testimony that you did not share that view? 6 A No. I think the e-mails are clear that I 7 did not share that view. 8 Q I'd like you to turn -- I hate to do this, 9 but there's another notebook up there. It's Number 5. 10 A Number 5. Okay. Thank you. This is 11 Number 1. This says Book Number 1. I have 3, 1, 2. 12 Q You should have 5 of 9 in front of you. 13 You had 4 of 9 in front of you before. 14 A Oh, 5. I'm sorry. 15 MR. HAMPSHIRE: Your Honor, this is also 16 on the stipulated exhibit list I believe. Let me 17 double-check. It's on the list for -- as to 18 admissibility and authenticity. 19 THE COURT: So you're formally moving that 20 in now? 21 MR. HAMPSHIRE: Yes, sir. 22 THE COURT: Plaintiffs' 153 will be</p>	<p style="text-align: right;">Page 95</p> <p>1 issues at different levels, so she understands what 2 our issues are. 3 Q Let me just read for the record. And who 4 is Anthony to your knowledge? She says, Thanks, 5 Anthony. 6 A Anthony Fusarelli is one of the planners. 7 He's in charge of the -- or has responsibility in the 8 community planning and housing development. I believe 9 that's his position. 10 Q All right. And you'll see that Demetra 11 says, Thanks, Anthony. I know you and I will be 12 discussing this directly. We are, of course, 13 struggling with a stormwater system that is so 14 inadequate on every conceivable level, so Liz's 15 issues -- and do you understand that to refer to you? 16 A Yes. Yeah. 17 Q Liz's issues are filtered through that 18 reality -- the system we have, which is so compromised 19 it lacks elasticity we want to have to absorb these 20 kinds of changes. We understand the charge you have 21 been given and don't envy you there. But then again, 22 you wouldn't want to be in Liz's shoes with her</p>

<p>1 responsibilities. These are shared challenges, and I 2 look forward to further discussions on how to, quote, 3 position, unquote, the policy discussion. 4 What -- so you said that you don't recall 5 actually seeing this at the time or do you ever recall 6 seeing this? 7 A Well, I think I saw it during our 8 deposition, but I don't really remember this 9 particular e-mail. I just -- so I -- but I'm not 10 going to deny that I was copied on it and I must have 11 looked at it, and, you know, yeah. 12 Q Do you have any understanding of what was 13 meant there at the bottom? Further discussion on how 14 to position the policy discussion? 15 MR. SULLIVAN: I'll just object to 16 foundation and speculation. 17 THE COURT: The objection is overruled. 18 You may answer the question. 19 THE WITNESS: Yeah. So I would -- my 20 understanding is something like that would be 21 that, you know, we -- as we go through and make 22 comments, we try to, you know, adjust the policy</p>	<p>Page 96</p> <p>1 BY MR. HAMPSHIRE: 2 Q Do you remember any discussions about the 3 policy in response to concerns that you raised? 4 A So there was a lot of discussion about how 5 to -- you know, what we could do that would make -- 6 improve the policy. This whole thing we're 7 discussing, this Missing Middle Housing study, how we 8 would make it, you know, better for stormwater and 9 along with other groups, but I'm focused on 10 stormwater, so, you know, we asked for things like 11 setbacks or protection for storm sewers or, you know, 12 lot coverage restrictions, et cetera. And those are 13 the type of things that were under discussion. 14 Q Do you have any recollection as to whether 15 you felt that your recommendations were being somehow 16 compromised to a policy? 17 MR. SULLIVAN: Objection to leading. 18 THE COURT: Sustained. 19 20 BY MR. HAMPSHIRE: 21 Q Ms. Thurber, do you feel like your 22 concerns were adequately addressed?</p>
<p>1 to accommodate everybody's concerns, form a 2 consensus on how it should be -- the final 3 product should be. 4 5 BY MR. HAMPSHIRE: 6 Q Did you have any understanding what the 7 policy was? What was being referred to as the policy? 8 A I think it's the Missing Middle Housing 9 study. It's a policy. You know, yeah. 10 Q Do you recall what role, if any, the 11 policy had in terms of addressing your concerns that 12 you expressed or not? 13 MR. SULLIVAN: Objection. Vague and 14 ambiguous. 15 THE WITNESS: I'm a little confused. 16 17 BY MR. HAMPSHIRE: 18 Q Do you remember any discussions about -- 19 THE COURT: Just a moment. Let me respond 20 to the objection. The objection is sustained. 21 Please re-state the question. 22</p>	<p>Page 97</p> <p>1 A I would have liked more, but I don't 2 always win. I don't always get everything I want. 3 I'm only the stormwater program manager. I don't 4 manage the whole county. 5 Q What, if anything, did you want that you 6 didn't get in this particular case? 7 MR. SULLIVAN: Just going to object to the 8 relevance of this type of opinion. It was not 9 part of the deliberative process. It's asking 10 for her personal opinion about what she wanted 11 and didn't get. 12 THE COURT: Objection overruled. You may 13 answer the question. 14 THE WITNESS: Yeah. I think I outlined it 15 in my concerns. I would have liked protection 16 for the existing storm sewers, setbacks. I would 17 have liked some setbacks to help us with that. 18 Setbacks on property lines. I would have liked 19 less lot coverage. I mean, I think I outlined 20 all that in the previous things we've talked 21 about. I would have liked controls in the 22 inundation areas.</p> <p>Page 99</p>

<p style="text-align: right;">Page 100</p> <p>1 BY MR. HAMPSHIRE:</p> <p>2 Q And you said you don't -- you don't -- you</p> <p>3 didn't get -- you don't always get everything you</p> <p>4 want, and I suppose that's true in life for all of us.</p> <p>5 But in this case you did not get everything you</p> <p>6 wanted, correct?</p> <p>7 A Right. So we had a -- my old boss and I</p> <p>8 used to say, You can get four out of five, you can get</p> <p>9 six out of seven, but you can never get, you know, all</p> <p>10 the things you want in life, right?</p> <p>11 Q What do you recall, if anything, was on</p> <p>12 the other side of that balance though between you</p> <p>13 getting what you want and you not getting what you</p> <p>14 want?</p> <p>15 A Well, again, they kept everything pretty</p> <p>16 much the same as what's already -- what at that time</p> <p>17 was already permitted under the existing zoning, and</p> <p>18 so in that regard, this proposal, you know, minimized</p> <p>19 to the -- you know, it didn't make it -- it minimized</p> <p>20 some of my concerns. In other words, it didn't</p> <p>21 increase the lot coverage. It didn't reduce the</p> <p>22 setbacks. It didn't do any of that, and so in that</p>	<p style="text-align: right;">Page 102</p> <p>1 people, and they were looking -- continue to look for</p> <p>2 ways to help that situation.</p> <p>3 Q And -- but my question was, Do you recall</p> <p>4 whether that policy or that goal was discussed in the</p> <p>5 context of your comments?</p> <p>6 A Well, sure. I think that that was part of</p> <p>7 the discussion, yes.</p> <p>8 Q What do you recall, if anything, about</p> <p>9 those discussions?</p> <p>10 A Well, just that I understand the concern,</p> <p>11 and, you know, yeah, I mean, I don't think that's an</p> <p>12 invalid concern or anything, but it's just not my</p> <p>13 responsibility. My responsibility as the stormwater</p> <p>14 infrastructure program manager is to be concerned</p> <p>15 about stormwater.</p> <p>16 Q If you'd turn to page -- Tab 162 in Book</p> <p>17 5.</p> <p>18 And, Your Honor, I believe this is also on</p> <p>19 our list. I'll double-check. Yes, it is.</p> <p>20 THE COURT: Do me a favor. If you want it</p> <p>21 in, ask that it be admitted.</p> <p>22 MR. HAMPSHIRE: I ask that it be admitted.</p>
<p style="text-align: right;">Page 101</p> <p>1 regard, keeping it the same as the storm -- these</p> <p>2 criteria the same as for single-family homes, we were</p> <p>3 already dealing with that, so in that regard, it</p> <p>4 wasn't -- it didn't bring up anything new.</p> <p>5 Q What, if any, role or do you recall</p> <p>6 whether or not the goal of providing increased housing</p> <p>7 options or housing types came into play in terms of</p> <p>8 you not getting everything you wanted?</p> <p>9 MR. SULLIVAN: Objection to vague and</p> <p>10 speculation. Lack of foundation.</p> <p>11 THE COURT: Sustained.</p> <p>12</p> <p>13 BY MR. HAMPSHIRE:</p> <p>14 Q Do you remember any discussions about the</p> <p>15 policy goal of providing increased housing supply</p> <p>16 and -- increased housing supply and diverse housing</p> <p>17 types?</p> <p>18 A What I know is that the concern for the</p> <p>19 cost of housing in Arlington is a concern that many</p> <p>20 people have shared, and it is an ongoing, you know,</p> <p>21 concern that the housing prices are so high that it</p> <p>22 makes it unaffordable for certain people, for many</p>	<p style="text-align: right;">Page 103</p> <p>1 MR. SULLIVAN: No objection.</p> <p>2 THE COURT: Plaintiffs' 162 is admitted</p> <p>3 into evidence.</p> <p>4 (Marked in evidence by the court as</p> <p>5 Plaintiffs' Exhibit Number 162.)</p> <p>6</p> <p>7 BY MR. HAMPSHIRE:</p> <p>8 Q And, Ms. Thurber, you'll see this is an</p> <p>9 e-mail from Demetra McBride dated Thursday, May 12,</p> <p>10 2022 to you and others. And it says, Rich and</p> <p>11 Demetra, I just listened in to part of the regular</p> <p>12 monthly ISD contractor and permittees meeting where</p> <p>13 CPHD was presenting on the Missing Middle Housing</p> <p>14 concept to get perspective from builders. It goes on</p> <p>15 to talk about one of the builders they like working</p> <p>16 with, Green Home Choice, said that if this proposal</p> <p>17 passes, he would expect to see twenty or more duplexes</p> <p>18 springing up in the following eighteen months. In</p> <p>19 general, builders sound very happy about the increased</p> <p>20 opportunity -- the increase opportunity on expensive</p> <p>21 Arlington lots. I've been talking to a handful of</p> <p>22 Arlington builders about this concept of duplexes for</p>

<p style="text-align: right;">Page 104</p> <p>1 a number of years, so I was surprised to hear this. 2 With no -- 3 THE COURT: Not surprised. 4 MR. HAMPSHIRE: Excuse me. I'm sorry, 5 Your Honor. Not surprised to hear this. With no 6 decreases in setbacks and no height increase, the 7 viability of more than a duplex on most lots 8 would be most challenging. 9 Do you recall that e-mail? 10 THE WITNESS: Again, I get hundreds and 11 thousands of e-mails. I don't recall every 12 single one, but, clearly, I'm copied here so, you 13 know -- 14 15 BY MR. HAMPSHIRE: 16 Q Do you remember the issue of, With no 17 decreases in setbacks and no height increase, the 18 viability of more than a duplex on most lots would be 19 challenging? 20 A Well, I think there were people advocating 21 for increases in height and reduced setbacks and all 22 of those things. So those were -- again, those were</p>	<p style="text-align: right;">Page 106</p> <p>1 A I think it was Jason. 2 Q He was the point person, correct? 3 A Yeah. He often is. Uh-huh. 4 Q And that was a pretty regular occurrence 5 in your experience to have representatives of the 6 department put together on a team that evaluates a 7 policy proposal from multiple different subject 8 expertise, correct? 9 A Right. 10 Q And there was nothing unusual about the 11 process that they used here to elicit comment from, 12 not just the point person, but then to go to the point 13 person and then go to the broader experts within the 14 department to obtain those comments, correct? 15 A Yeah. There was nothing unusual about 16 this process in my mind. 17 Q And you were not at the time that -- 18 referring to some of your earlier comments about the 19 concerns that you were raising, you were not at that 20 point considering the expected rate of growth or 21 change with EHOs, correct? It was more of a 22 generalized statement of problems, but you had not</p>
<p style="text-align: right;">Page 105</p> <p>1 part of the issues that were under discussion. 2 MR. HAMPSHIRE: Your Honor, those are all 3 the questions I have. Thank you. 4 THE COURT: Okay. Cross-examination? 5 MR. SULLIVAN: Yes, Your Honor. If I 6 could have just a second to get situated. 7 8 CROSS-EXAMINATION 9 10 BY MR. SULLIVAN: 11 Q I guess now it's good afternoon, 12 Ms. Thurber. How are you? 13 A Good. How are you? 14 Q I won't take long. I appreciate you 15 making the trip here to testify today. We walked 16 through a number of documents and we may refer to them 17 here in my questioning, but you were not designated as 18 the point person for your department on the 19 interdepartmental team that conducted the Missing 20 Middle Housing study, correct? 21 A Right. 22 Q That was Mr. Papacosma?</p>	<p style="text-align: right;">Page 107</p> <p>1 been privy to some of the calculations and some of the 2 modeling as to how much EHO was actually going to be 3 developed in any particular area. Is that fair 4 enough? 5 A Fair. 6 Q And I just want to walk through the 7 timeline. If you'll bear with me. If we go to 136. 8 I think this is, unfortunately, in Book 4, so you are 9 getting your workout today. 10 A These are heavy books. Okay. Book 4, 11 Page 136? 12 Q Yes, ma'am. 13 A Okay. It's the same one at the bottom? 14 Q Yes. Just the date there. That's March 15 17th, 2022 is the date of that e-mail that you sent, 16 correct? 17 A Okay. Yes. That's what it says. 18 Q And if you turn to the next page at ArCo 19 11504 -- 20 A Okay. 21 Q -- you'll see it looks like the e-mail 22 towards the middle of the page from Mr. Papacosma</p>

<p style="text-align: right;">Page 108</p> <p>1 Thursday, March 17th. That's when that was sent hot 2 off the presses. Please see the attached preliminary 3 Missing Middle Housing study? 4 A Okay. Yes, I see it. 5 Q Does that comport with your recollection 6 that's the -- the date that you sent these concerns 7 was the date that you received this preliminary set of 8 proposals that were developed by the Missing Middle 9 Housing study group? 10 A Right. I mean, it looks like at 11:17 11 Jason's e-mail and then I was commenting on 11:37. 12 Q So a pretty fast turnaround? 13 A It was a pretty fast turnaround. 14 Q Okay. And then if we go to -- I believe 15 it's Tab 133 -- or sorry -- 134. 16 A Okay. 17 Q This is the e-mail chain in which 18 Mr. Papacosma embedded the shared document that's Tab 19 133, Plaintiffs' 133? 20 A Right. 21 Q The date of that is March 21st, correct? 22 A I think it's -- yes. March 21st.</p>	<p style="text-align: right;">Page 110</p> <p>1 considerations and the concerns that were raised from 2 the stormwater group, which included you, Ms. McBride, 3 and Mr. Papacosma, correct? 4 A Right. 5 Q I'd like to ask to look at Defendants' 6 153. If you could walk that up. A copy for counsel. 7 This is another document that is part of the 8 stipulated list of defense exhibits. Now, 9 Ms. Thurber, if you'd look at the second page, 10 actually, of that document. 11 A The second page? Okay. 10187. Okay. 12 Q Yes, ma'am. And I guess the previous page 13 shows the bottom of that e-mail chain, and that's an 14 e-mail from Matthew Ladd. Do you see that? 15 A Okay. 16 Q And that's dated March 30th? 17 A Okay. Yes. 18 Q And that's after the e-mails and Teams 19 messages we just discussed on March 17th, March 21st, 20 and March 24th, correct? 21 A Right. 22 Q And this is an e-mail from Matthew Ladd.</p>
<p style="text-align: right;">Page 109</p> <p>1 Q And so it was sometime around then when 2 you would have added your comments to the shared 3 document that collected all the concerns from various 4 different people within your department to be shared 5 with the Missing Middle Housing, correct? 6 A Uh-huh. Right. 7 Q Now, if we turn to Plaintiffs' 153. That 8 will be in the other notebook. 9 A 153? 10 Q Yes. And I'll just state for the record 11 that I understand this to be a copy of a Teams message 12 and not an e-mail. Is Teams something that you use to 13 communicate sometimes -- 14 A Yes. 15 Q -- internally? 16 A Uh-huh. 17 Q And the date of this message that was 18 referenced from Ms. McBride, that was March 24th, 19 2022, correct? 20 A Yes. 21 Q And you had talked some about some of the 22 responses that were made as a result of some of the</p>	<p style="text-align: right;">Page 111</p> <p>1 He was the leader of the interdepartmental team for 2 the Missing Middle Housing study at that time, 3 correct? 4 A Yes. 5 Q And you see this e-mail where he starts 6 with, DES colleagues? 7 A Uh-huh. 8 Q And he outlines -- you see three changes 9 there that he talks about as being changes to the 10 policy to address some of the concerns. Is this 11 consistent with your understanding that changes were 12 made in terms of what the policy recommendations would 13 be at this point of the Missing Middle Housing study 14 based on the concerns that were raised by the group in 15 DES? 16 A Right. And it -- yes, the changes were 17 made, and he outlines them one, two, and three, right? 18 Q Right. And if you look at Tab 162, which 19 you were just looking at. Sorry to go back into a 20 circle, but we have to retrace our steps somewhat in 21 cross-exam. Do you have that in front of you, 22 Ms. Thurber?</p>

<p style="text-align: right;">Page 112</p> <p>1 A Yes.</p> <p>2 Q And this e-mail that was discussed was</p> <p>3 from May 12th of 2022, correct?</p> <p>4 A Uh-huh.</p> <p>5 Q So that came after, and I understood from</p> <p>6 your testimony this was in the context of there were</p> <p>7 voices saying that we need to actually allow for more</p> <p>8 setback to allow for the better possibility of more</p> <p>9 EHO development. Those were voices in the community</p> <p>10 that were out there saying that this policy should be</p> <p>11 more liberal to allow more EHO; is that correct?</p> <p>12 A Right. What I understand what they did,</p> <p>13 as part of the public engagement process, they took</p> <p>14 the -- you know, the recommendations to one of the</p> <p>15 interest groups, which is the ISD Contractors and</p> <p>16 Permitters, and builders attend that meeting, and</p> <p>17 that's the feedback that Helen was reporting back to</p> <p>18 us.</p> <p>19 Q Was to get exceptions to the setback</p> <p>20 rules --</p> <p>21 A Oh, yeah.</p> <p>22 Q -- that were in the proposal?</p>	<p style="text-align: right;">Page 114</p> <p>1 had existed before EHO? It was just single- family</p> <p>2 units where you have bigger houses going on smaller</p> <p>3 lots, correct?</p> <p>4 A Right.</p> <p>5 Q And your concern was that maybe we should</p> <p>6 address the EHO part before it gets passed on, but it</p> <p>7 wasn't that it was necessarily unique to the</p> <p>8 development of EHO. It was just a problem that</p> <p>9 existed countywide in terms of the stormwater program</p> <p>10 of having consistent challenges with setbacks and</p> <p>11 property disputes with homeowners where you're trying</p> <p>12 to lay down infrastructure, correct?</p> <p>13 A Correct.</p> <p>14 MR. SULLIVAN: No further questions, Your</p> <p>15 Honor.</p> <p>16 THE COURT: Thank you. Redirect?</p> <p>17</p> <p>18 REDIRECT EXAMINATION</p> <p>19</p> <p>20 BY MR. HAMPSHIRE:</p> <p>21 Q Ms. Thurber, I think you said though on --</p> <p>22 with respect to -- with respect to 137 --</p>
<p style="text-align: right;">Page 113</p> <p>1 A Correct.</p> <p>2 Q And your understanding though is that the</p> <p>3 policy remained and through the adoption of the</p> <p>4 ultimate amendment was that the rules would be the</p> <p>5 same for EHO and single-family-unit homes, correct, in</p> <p>6 terms of setback, lot coverage, all of those?</p> <p>7 A Right. We were going to keep it the same.</p> <p>8 Q Correct. And --</p> <p>9 A I never spoke to a single builder or</p> <p>10 anything about this policy. It's not my place to do</p> <p>11 that.</p> <p>12 Q Sure.</p> <p>13 A Helen is just letting us know this is the</p> <p>14 feedback that she had heard.</p> <p>15 Q Understood. And thank you for that -- for</p> <p>16 that clarification. Just one more question. Some of</p> <p>17 the recommendations where you didn't get what you said</p> <p>18 that you thought would be needed in terms of</p> <p>19 additional setbacks, those types of challenges and the</p> <p>20 problems that you have with negotiating easements and</p> <p>21 getting in the infrastructure that you have to deal</p> <p>22 with in terms of stormwater, those are challenges that</p>	<p style="text-align: right;">Page 115</p> <p>1 A Is that the one in the book?</p> <p>2 Q Yeah. That's the one that's in 4 of 9.</p> <p>3 A 137?</p> <p>4 Q Yes, ma'am. You say there though that it</p> <p>5 is your opinion -- in my opinion -- it's my opinion</p> <p>6 that the problem with the current proposal is that it</p> <p>7 expands by-right zoning without any -- excuse me --</p> <p>8 without and before any requirement is made to analyze</p> <p>9 and address adverse stormwater impacts.</p> <p>10 You are concerned there, are you not,</p> <p>11 about allowing a new by-right zoning without analyzing</p> <p>12 stormwater impacts before so doing; isn't that right?</p> <p>13 A Yes, I have that concern.</p> <p>14 MR. HAMPSHIRE: Your Honor, for</p> <p>15 housekeeping I want to make sure we got 133 and</p> <p>16 134 in evidence. I meant to move it in. If I</p> <p>17 didn't, I would like to move it now.</p> <p>18 THE COURT: 133 and 134 I have as being</p> <p>19 admitted.</p> <p>20 MR. HAMPSHIRE: Thank you.</p> <p>21</p> <p>22</p>

<p style="text-align: right;">Page 116</p> <p>1 BY MR. HAMPSHIRE:</p> <p>2 Q What about -- you mentioned in your</p> <p>3 earlier testimony overland relief. I think you said</p> <p>4 that that concerned you. What is overland relief?</p> <p>5 A Overland relief is a pathway for</p> <p>6 stormwater to flow when the -- the stormwater -- the</p> <p>7 underground conveyance system can't handle the amount</p> <p>8 of water so it runs over land, over -- over land, on</p> <p>9 the top, on the surface. And it's a good idea to have</p> <p>10 a pathway for this water to go without damaging</p> <p>11 property or endangering people.</p> <p>12 Q And that was one of your concerns that was</p> <p>13 not addressed; isn't that correct?</p> <p>14 A Right. I would have liked more protection</p> <p>15 for those kind of pathways, and they kept it the same</p> <p>16 as it is now for single-family homes as it was back</p> <p>17 then.</p> <p>18 MR. HAMPSHIRE: Those are all the</p> <p>19 questions I have. Thank you.</p> <p>20 THE COURT: Thank you. You may step down.</p> <p>21 MR. SULLIVAN: Yes, Your Honor. I just</p> <p>22 had a housekeeping matter, if I may. And I beg</p>	<p style="text-align: right;">Page 118</p> <p>1 ERIC THURSTON ACKERMAN,</p> <p>2 a plaintiff, called as a witness on his own behalf,</p> <p>3 having been first duly sworn, was examined and</p> <p>4 testified as follows:</p> <p>5</p> <p>6 DIRECT EXAMINATION</p> <p>7</p> <p>8 BY MS. COUSLER:</p> <p>9 Q Good afternoon. Can you state your name</p> <p>10 for the record?</p> <p>11 A Yes. My name is Eric Thurston Ackerman.</p> <p>12 Q What is your address?</p> <p>13 A 3677 North Harrison Street in Arlington.</p> <p>14 Q How long have you lived at 3677 North</p> <p>15 Harrison Street?</p> <p>16 A About twenty-four years.</p> <p>17 Q What neighborhood do you live in?</p> <p>18 A What neighborhood?</p> <p>19 Q Yes. What neighborhood do you live in?</p> <p>20 A Woodlands -- I think it's Woodlands Acres.</p> <p>21 I'm right across from the Williamsburg Middle School.</p> <p>22 Q Do you rent or own your property?</p>
<p style="text-align: right;">Page 117</p> <p>1 your pardon. I don't believe I actually moved</p> <p>2 for the admission of Defense 153. I would make</p> <p>3 that motion, if possible, at this time since it's</p> <p>4 one of the stipulated documents.</p> <p>5 THE COURT: All right. Defendants' 153</p> <p>6 shall be admitted into evidence.</p> <p>7 (Marked in evidence by the court as</p> <p>8 Defendants' Exhibit Number 153.)</p> <p>9 THE WITNESS: Okay. Am I done?</p> <p>10 THE COURT: The witness is excused. You</p> <p>11 are free to go. You may leave the courthouse and</p> <p>12 go about your business.</p> <p>13 Next witness?</p> <p>14 MR. HAMPSHIRE: Eric Ackerman.</p> <p>15 (Mr. Ackerman was sworn.)</p> <p>16</p> <p>17 -----oOo-----</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p>	<p style="text-align: right;">Page 119</p> <p>1 A I own.</p> <p>2 Q Have you ever looked up your home on</p> <p>3 Google Maps?</p> <p>4 A I have.</p> <p>5 Q Are you familiar with the satellite and</p> <p>6 photographic images available on Google Maps?</p> <p>7 A I am.</p> <p>8 Q I'm going to show you what has been marked</p> <p>9 as Plaintiffs' Exhibit 31. It will be in Tab 31 in</p> <p>10 the first book.</p> <p>11 A The first book. Tab 31 did you say?</p> <p>12 Q Yes.</p> <p>13 A Okay. I recognize that.</p> <p>14 Q What is that?</p> <p>15 A That's my neighborhood.</p> <p>16 Q And what is the little red dot?</p> <p>17 A That's my home.</p> <p>18 MS. COUSLER: Okay. And I would like to</p> <p>19 move for the admission of Plaintiffs' 31.</p> <p>20 MR. STARKS: No objection.</p> <p>21 THE COURT: Plaintiffs' 31 shall be</p> <p>22 admitted into evidence.</p>

<p style="text-align: right;">Page 120</p> <p>1 (Marked in evidence by the court as 2 Plaintiffs' Exhibit Number 31.) 3 4 BY MS. COUSLER: 5 Q Using Exhibit 31 would you describe the 6 area surrounding your property? 7 A Well, it's a highly wooded area. It was 8 once described by a friend as the North Arlington 9 woods. It's a lovely wooded area. 10 Q I'm going to show you what's been marked 11 as Plaintiffs' Exhibit 30. Do you recognize this 12 document? 13 A Yes. 14 Q Okay. What is it? 15 A This is a map that shows -- it shows my 16 neighborhood in a larger scale so -- 17 Q Okay. Do you know what residential 18 district your home is in? 19 A You're asking me in relation to the zoning 20 ordinance? 21 Q Or in relation to this map even. 22 A In relation to this map, I'm in -- I don't</p>	<p style="text-align: right;">Page 122</p> <p>1 A I'm in a zone that's defined by 10,000 2 square feet, and under the new ordinance, I can't 3 have -- in that zone we're allowed to build four to 4 six multiplexes or four to six housing units. 5 Q If I show you what's been marked as 6 Exhibit 29, do you recognize it? 7 A Yes. That's a picture of the front of my 8 house. 9 Q I don't see much house there. What is -- 10 A There are a lot of trees on my lot. 11 MS. COUSLER: Okay. I'd move for the 12 admission of Plaintiffs' Exhibit 29. 13 MR. SULLIVAN: No objection. 14 THE COURT: Plaintiffs' 29 shall be 15 admitted into evidence. 16 (Marked in evidence by the court as 17 Plaintiffs' Exhibit Number 29.) 18 19 BY MS. COUSLER: 20 Q Directing your attention to the exhibits 21 that we've just looked at, 29, 30, and 31, can you 22 describe your home to the court?</p>
<p style="text-align: right;">Page 121</p> <p>1 see a label. I see my property. 2 MS. COUSLER: Okay. 3 THE COURT: Look in the middle and then 4 down a little bit. You see a road that says, 5 Alley, and then Old Dominion Drive? 6 7 BY MS. COUSLER: 8 Q It's the intersection of Little Falls. 9 A Yes. R-10. Thank you. R-10. 10 MS. COUSLER: I'm going to move for the 11 admission of Plaintiffs' 30. 12 MR. STARKS: No objection. 13 THE COURT: Plaintiffs' 30 shall be 14 admitted. 15 (Marked in evidence by the court as 16 Plaintiffs' Exhibit Number 30.) 17 18 BY MS. COUSLER: 19 Q Do you understand the zoning of your 20 property in the R-10 district? 21 A I do. 22 Q What do you understand about it?</p>	<p style="text-align: right;">Page 123</p> <p>1 A Certainly. I live in a house that started 2 life as a rambler built in 1959. A wing was added in 3 the mid-eighties, and subsequent to that, when I 4 bought the house, at a certain point my wife -- my 5 then wife and I updated the interior, the top floor, 6 new kitchen, and so we've modernized it. 7 Q So as I've already mentioned, is your home 8 behind the trees in that picture in Exhibit 29? 9 A Yes, it is. 10 Q Are there any other trees on the property? 11 A Oh, there are many trees on the property. 12 The lot behind my house is wooded, so I have lots of 13 mature trees. It's a beautiful, calming place to sit 14 on the porch and look at the trees. 15 Q And why did you choose to purchase your 16 home at -- 17 A Well, it was largely a function of the 18 lot, the wooded lot. It also was an agreeable -- 19 inside the house, the configuration was agreeable. 20 There's a master bedroom upstairs, and then there are 21 three bedrooms and a bathroom and rec room downstairs, 22 and for a family, that was -- appealed to me. Put the</p>

<p>1 kids downstairs.</p> <p>2 Q If I refer to the Expanded Housing Option</p> <p>3 Amendment, do you know what I'm referencing?</p> <p>4 A I do know what you mean.</p> <p>5 Q Okay. And we're going to call it EHO</p> <p>6 amendment. Is that all right with you?</p> <p>7 A That's fine.</p> <p>8 Q When did you first hear about the EHO</p> <p>9 amendment or the Missing Middle Housing initiative?</p> <p>10 A I don't know exactly. It was a couple of</p> <p>11 years before the amendments were actually adopted. I</p> <p>12 have been involved with a citizens group called the</p> <p>13 Arlington Tree Action Group. We're concerned about</p> <p>14 loss of tree cover, and I think it was in that context</p> <p>15 that I first heard about it.</p> <p>16 Q What were your initial thoughts when you</p> <p>17 first learned about the Missing Middle Housing</p> <p>18 initiative?</p> <p>19 A I was concerned about the danger to our</p> <p>20 tree cover. We -- in Arlington we've been losing our</p> <p>21 tree cover, and as we earlier heard earlier today,</p> <p>22 even the single-family zone, the by-right development</p>	Page 124	<p>1 A Yes.</p> <p>2 Q It's a little hard to see in this copy,</p> <p>3 but is that house you said that was just redeveloped</p> <p>4 where they took down the hundred-year trees, is that</p> <p>5 the one to the left of the dot in your photo?</p> <p>6 A Yes.</p> <p>7 Q Okay. And that has -- does that have less</p> <p>8 tree canopy now than it did?</p> <p>9 A Certainly does. Yes. You can see it in</p> <p>10 the picture actually. If you look at the front -- the</p> <p>11 front quadrant of that lot is noted -- has noticeably</p> <p>12 less tree cover.</p> <p>13 Q Why are you worried about the trees being</p> <p>14 cut down next to your home?</p> <p>15 A Well, at a time of climate change, it is</p> <p>16 in all of our interests to preserve our tree canopy.</p> <p>17 Trees fix carbon and they mitigate stormwater, large</p> <p>18 trees. So it's a community resource really, so it</p> <p>19 will affect me to that extent, yeah.</p> <p>20 Q Do you know whether there's a tree</p> <p>21 planting requirement in the EHO amendment?</p> <p>22 A I don't know specifically. I wouldn't be</p>	Page 126
<p>1 has allowed the destruction of a lot of trees. So</p> <p>2 we've lost -- our tree cover is declining. It's</p> <p>3 diminishing, so we've been concerned about that for a</p> <p>4 long time.</p> <p>5 Q When you say you're concerned about the</p> <p>6 tree canopy loss, regarding -- specifically regarding</p> <p>7 the EHO amendments, why is tree canopy loss a concern</p> <p>8 to you?</p> <p>9 A I think the development of multiplexes and</p> <p>10 multi-units will lead to the destruction -- increased</p> <p>11 destruction of trees, because the experience -- and I</p> <p>12 can speak from experience. The house right next to me</p> <p>13 was just taken down and rebuilt, and in the process</p> <p>14 two beautiful hundred-year-old oak trees were taken</p> <p>15 down. It's -- the reality is that the developers who</p> <p>16 do this work are motivated by the profit potential,</p> <p>17 and the least cost, most profitable way to redevelop a</p> <p>18 site is to take down all the trees that are in the</p> <p>19 way, and so that's what I expect -- more of that will</p> <p>20 happen with EHO.</p> <p>21 Q Directing your attention back to Exhibit</p> <p>22 31.</p>	Page 125	<p>1 surprised if there is, but I know from working with</p> <p>2 ATAG these small -- small baby trees, if you will,</p> <p>3 don't convey the benefits that a large mature tree</p> <p>4 does. It's not in equivalence. Yeah.</p> <p>5 Q What kind of benefits does the large tree</p> <p>6 convey that the small one does not?</p> <p>7 A They absorb a lot more water.</p> <p>8 MR. SULLIVAN: I'm just going to object</p> <p>9 to -- object to foundation as to this getting</p> <p>10 into some expert territory.</p> <p>11 THE COURT: The objection is sustained.</p> <p>12 Wait for the next question, please.</p> <p>13</p> <p>14 BY MS. COUSLER:</p> <p>15 Q Do you think the EHO development will have</p> <p>16 a different impact on tree canopy than single home --</p> <p>17 a single-family home?</p> <p>18 MR. SULLIVAN: I'd just object to the</p> <p>19 extent he can explain his concern but not offer</p> <p>20 an opinion as to whether it will or will not.</p> <p>21 THE COURT: The -- I don't think you need</p> <p>22 an expert to answer that question. I think that</p>	Page 127

<p style="text-align: right;">Page 128</p> <p>1 can be in his -- his knowledge and experience. 2 The objection is overruled. You may answer the 3 question, sir. 4 THE WITNESS: I have -- to be honest, I'm 5 not sure if EHO development will lead to the 6 greater destruction of trees. I think, as we've 7 heard, the development of these mega-mansions 8 already is exacting a high price, so I think it 9 will continue that trend so -- 10 11 BY MS. COUSLER: 12 Q You mentioned you were concerned about 13 trees absorbing water. Do you have any concerns about 14 stormwater runoff as related to EHO amendments? 15 A Yes. I know from my work with ATAG that 16 these large trees do absorb a lot more water than 17 small trees, and so as a stormwater problem -- 18 MR. SULLIVAN: Objection, Your Honor, as 19 to getting into this expert opinion about 20 stormwater, soaking up the water by trees. It's 21 outside the of scope of -- 22 THE COURT: A general statement like this</p>	<p style="text-align: right;">Page 130</p> <p>1 as Defendants' Exhibit 52. Do you recognize this 2 document? 3 A I'm not clear now whether I'm looking at 4 this map or the -- 5 Q The one in your hand. 6 A The one that's in my hand. The 7 Plaintiffs' Exhibit 52. Is that what we're looking 8 at? 9 Q Defendants' -- the one -- yes. 10 Defendants' 52. 11 A Okay. This illustrates what I said about 12 flood -- I live up the hill from this flood area. 13 Q Okay. Can you show us on the map where 14 the flood zone is? 15 A It's the area marked in this red -- these 16 red marks, and so my house is -- is up the hill. My 17 house is -- 18 Q I believe it's in the left-hand corner by 19 the school. Also, can you get closer to the mic? The 20 court reporter can't hear you. 21 A Okay. I'm sorry. So, yes, I see my house 22 now. My house is here. The flooding area is right</p>
<p style="text-align: right;">Page 129</p> <p>1 related to more than his lot in my judgment would 2 convey the province of an expert; therefore, the 3 objection is sustained. 4 5 BY MS. COUSLER: 6 Q So you have concerns about stormwater 7 runoff. Do you have concerns about stormwater runoff 8 as particular to your own home? 9 A I do. I live at the top of a hill, and 10 behind my house down the hill is a flood area, which, 11 you know, by definition of flood area is an area that 12 has experienced flooding, more flooding than other 13 places in the county and, therefore, is more likely to 14 experience flooding, and so heavy rains will drain 15 into the -- you know, behind my house and exacerbate 16 flooding, yes. And -- well, I would make an 17 observation in relation to the benefit of trees, but 18 that may not be -- 19 THE COURT: Wait for the next question. 20 21 BY MS. COUSLER: 22 Q I'm going to show you what's been marked</p>	<p style="text-align: right;">Page 131</p> <p>1 along here, which is down the hill from my house. So 2 if we have heavy rains and if there -- if the tree 3 canopy has been disrupted, disturbed, removed, 4 reduced, it will increase the potential for flooding. 5 MS. COUSLER: Okay. I'm going to move for 6 the admission of Defendants' Exhibit 52. 7 MR. SULLIVAN: No objection. 8 THE COURT: Defendants' 52 shall be 9 admitted into evidence. 10 (Marked in evidence by the court as 11 Defendants' Exhibit Number 52.) 12 13 BY MS. COUSLER: 14 Q Did you have other concerns about EHO 15 amendments? 16 A I do. I did. 17 Q What are they? 18 A A series of concerns. I have concerns 19 about financial impacts on me, environmental impacts, 20 and the traffic and congestion impacts. So I could 21 elaborate each one in turn if you'd like. 22 Q Yeah. We can go -- let's start with</p>

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1 financial impact.

2 A All right. I think it is very likely that

3 increased density of population will drive the need to

4 increase supporting infrastructures. For water and

5 sewer, for schools, for all kinds of infrastructure

6 that supports the community. And, of course, that

7 translates into tax burdens, increasing tax burdens.

8 So there's a financial impact. I will be exposed to

9 increase in the tax rate. The -- my understanding is

10 the county assesses property tax on the highest and

11 best use --

12 Q Can you tell me what you know -- what's

13 your understanding of the -- no. Can you tell me what

14 you have learned about the tax assessment and where

15 you've gotten that information from?

16 MR. SULLIVAN: Is this about his specific

17 property?

18 THE WITNESS: My specific property, yes.

19 THE COURT: I think the witness is

20 concerned that his real estate taxes will go up.

21 I think we can move on.

22 THE WITNESS: Yes, Your Honor. Thank you.

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1 BY MS. COUSLER:

2 Q Okay. Sorry. I do have a follow-up

3 question on taxes. Wouldn't a tax base increase --

4 wouldn't the tax base increase if density increased?

5 MR. SULLIVAN: Objection. Foundation and

6 speculation.

7 THE COURT: The objection is sustained.

8

9 BY MS. COUSLER:

10 Q Do you have -- if there were more

11 people -- nope.

12 THE COURT: I get the point. He's

13 concerned his taxes will go up. Let's move on to

14 the next issue.

15 MS. COUSLER: Yes, Your Honor.

16

17 BY MS. COUSLER:

18 Q You also mentioned traffic and congestion,

19 correct?

20 A Yes.

21 Q What about that are you concerned about in

22 regards to the EHO amendment?

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1 A In the neighborhood -- in my neighborhood,

2 as I indicated, I'm right across from the Williamsburg

3 Middle School, and as a result, we already have

4 significant problems with parking and congestion

5 during the school year. Twice a day, in the morning

6 and in the afternoon, the roads are totally occluded

7 and you can't get in. Parking is difficult, is

8 already difficult. On the other side of the street,

9 there is no parking because it's supposed to be

10 reserved for the school, and so parking is already

11 difficult.

12 My son lives with me, and there are times

13 when he comes home and he can't find a parking spot on

14 the street. So I think increased densification,

15 increased use of -- development of multiplexes with

16 only one-half parking space per home is bound to

17 increase traffic congestion -- parking problems and

18 congestion, so I'm sure there will be an impact in my

19 neighborhood, would be an impact to my neighborhood.

20 Q Could someone moving into your

21 neighborhood choose not to have a car?

22 A Well, we are all free and you can choose

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1 not to have a car, but then you have to address how

2 you're going to get around. I think it's most

3 unlikely that somebody would live in my neighborhood

4 and not have a car. There's nobody that currently

5 lives in my neighborhood that does not have a car, no.

6 Q You also said you had environmental

7 concerns. Are those any different than the tree

8 canopy and the stormwater we've already talked about?

9 A In addition to the environmental -- the

10 climate change impacts and water -- rainwater, there

11 is an emotional impact, and I class that as part of

12 the environment. I bought this place -- I bought my

13 house because it's a relaxing place to live. It's a

14 refuge, if you will, from the world. I used to work

15 for the Ability Industry and always on the run. It

16 was always a calming influence to come home, and

17 now -- and I've already had the experience of living

18 next to a redevelopment to my house, and it shatters

19 that calm. It's very upsetting. I have to listen to

20 noise and -- yeah. So I expect EHO -- more EHO would

21 be more of that.

22 Q Do you have any other concerns about EHO

<p style="text-align: right;">Page 136</p> <p>1 development in your neighborhood?</p> <p>2 A I think we've covered it. We've talked</p> <p>3 about infrastructure, environment, the financial,</p> <p>4 traffic and congestion. I think that pretty well</p> <p>5 covers it. Yeah.</p> <p>6 Q Do you live in a normal-sized lot for your</p> <p>7 district?</p> <p>8 A For my district, yeah.</p> <p>9 Q Are the lots next to you the same size?</p> <p>10 A Some of them are actually considerably</p> <p>11 bigger. I think at least one of them meets the one-</p> <p>12 acre criterion for needing a special exemption if</p> <p>13 you're going to develop on that lot. Mine does not.</p> <p>14 So in that sense, there's a differential impact in</p> <p>15 terms of the protections that you might --</p> <p>16 MR. SULLIVAN: I'm just going to object to</p> <p>17 the extent this is asking him to opine on the</p> <p>18 application of zoning ordinance to properties</p> <p>19 other than his own.</p> <p>20 THE COURT: Objection overruled. The</p> <p>21 answer he gave so far is fine, but he shouldn't</p> <p>22 go any further than that.</p>	<p style="text-align: right;">Page 138</p> <p>1 MS. COUSLER: It supports his testimony</p> <p>2 that some of his neighbors have bigger lots.</p> <p>3 MR. SULLIVAN: Okay. We don't object to</p> <p>4 the admission of it then.</p> <p>5 THE COURT: Defendants' 65?</p> <p>6 MS. COUSLER: I'm sorry. 55.</p> <p>7 THE COURT: 55. Thank you. Defendants'</p> <p>8 55 is admitted into evidence.</p> <p>9 (Marked in evidence by the court as</p> <p>10 Defendants' Exhibit Number 55.)</p> <p>11</p> <p>12 BY MS. COUSLER:</p> <p>13 Q And you've already -- your other concerns</p> <p>14 are -- you've already listed them, right? You don't</p> <p>15 have any other concerns?</p> <p>16 A No. That covers me. Yeah.</p> <p>17 MS. COUSLER: No further questions.</p> <p>18 THE COURT: Cross-examination?</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p>
<p style="text-align: right;">Page 137</p> <p>1 MS. COUSLER: I understand, Your Honor.</p> <p>2</p> <p>3 BY MS. COUSLER:</p> <p>4 Q I'm going to show you what has been marked</p> <p>5 as Defendants' Exhibit 55. Do you recognize this</p> <p>6 document?</p> <p>7 A I do.</p> <p>8 Q What is it?</p> <p>9 A This is a listing presumably from the</p> <p>10 county that describes my neighbor several doors down,</p> <p>11 Mark and Shubhda Fajfar, and it describes a huge -- it</p> <p>12 describes one of these lots that is bigger than an</p> <p>13 acre.</p> <p>14 MS. COUSLER: Okay. I'm going to move for</p> <p>15 the admission of Plaintiffs' Exhibit 55.</p> <p>16 MR. SULLIVAN: Objection. What is the</p> <p>17 relevance?</p> <p>18 THE COURT: Plaintiffs' or Defendants'?</p> <p>19 MS. COUSLER: Defendants'. Sorry.</p> <p>20 Defendants'.</p> <p>21 MR. SULLIVAN: What is the relevance of</p> <p>22 the use of this document?</p>	<p style="text-align: right;">Page 139</p> <p>1 CROSS-EXAMINATION</p> <p>2</p> <p>3 BY MR. SULLIVAN:</p> <p>4 Q Good afternoon, Mr. Ackerman. Good to see</p> <p>5 you. How are you?</p> <p>6 A Thank you. I'm fine.</p> <p>7 Q You've spoken before, but just in terms of</p> <p>8 your testimony here today, one of the concerns that</p> <p>9 motivates much of your concern is the loss of trees in</p> <p>10 your community, correct?</p> <p>11 A Correct.</p> <p>12 Q And that's driven by concerns about the</p> <p>13 environmental impact and about a personal effect that</p> <p>14 that will have on your wellbeing of just the benefits</p> <p>15 of being in nature, natural settings, that type of</p> <p>16 thing, correct?</p> <p>17 A That's correct.</p> <p>18 Q So there's nothing about the EHO</p> <p>19 amendments that require you to remove trees from your</p> <p>20 property though, correct?</p> <p>21 A That's correct.</p> <p>22 Q And there's nothing about the EHO</p>

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1 amendments that would prevent you from being able to
 2 use your own property in the way that you see fit with
 3 respect to planting trees, curating trees, what have
 4 you, on your property?
 5 A That's true. On my property, yes.
 6 Q And, likewise, the EHO amendments do not
 7 prevent or change in any way the right of your
 8 neighbors to do as they please on their properties
 9 with respect to trees and other things that might be
 10 on their property that you enjoy but are on their
 11 property, correct?
 12 A Correct.
 13 Q And there's nothing about the EHO
 14 amendments, to be clear, that regulates your use of
 15 your property in a way that restricts you from doing
 16 something that you would like to do on your property,
 17 correct?
 18 A Correct.
 19 Q Your legal rights to do as you would
 20 please on your property was not impacted by the EHO
 21 amendments, correct?
 22 MS. COUSLER: Objection to the extent it

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1 calls for a legal conclusion.
 2 THE COURT: Sustained.
 3
 4 BY MR. SULLIVAN:
 5 Q In terms of your concerns, it's fair to
 6 say that you have no plans and it's your understanding
 7 that you have no plans to use your property in a way
 8 that would be prohibited by the EHO amendments,
 9 correct?
 10 A That's correct.
 11 Q You mentioned one of your concerns being
 12 the impacts of stormwater runoff from development as
 13 well. And I believe you described that your property
 14 sits atop a hill and that there's a lower-lying area
 15 that is flood prone, correct?
 16 A Yes.
 17 Q So the concern is not about flooding of
 18 your property, correct?
 19 A That's correct.
 20 Q It's concern about another's property
 21 perhaps having more significant flooding as a result
 22 of increased stormwater runoff?

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1 A Yeah. I think that's correct.
 2 Q And in terms of the financial impacts that
 3 I believe you raised, you said that you were concerned
 4 about the increased infrastructure costs and what not.
 5 You would agree though to the extent that there are
 6 any increases in costs in infrastructure as a result
 7 of EHO or other growth, that that's something --
 8 that's a cost that's going to be shared by all the
 9 citizens of Arlington County, correct? Not just you
 10 in particular?
 11 A Well, we have infrastructure costs that we
 12 all share, but the tax assessment on my property I
 13 think may be higher than elsewhere because I have a
 14 larger lot and it's maybe more suitable for
 15 development of a multiplex than other zones where the
 16 lot size is smaller. So in that regard, I think it
 17 may be a differential financial impact.
 18 Q So you believe there may be some market
 19 impact that we don't know yet that could impact your
 20 property differently than somewhere else?
 21 A I'm concerned about tax rates -- Your
 22 Honor picked up on that, and you're very right --

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1 because my taxes have already gone up.
 2 Q As a result of the growth from single-
 3 family-unit houses increasing in value, correct?
 4 A We can't -- that's right. We can't --
 5 can't blame that on EHOs, yeah.
 6 Q And you spoke about some of your
 7 engagement with the process, and you actually wrote a
 8 letter to the board, correct?
 9 A I did.
 10 Q And expressed some of your concerns about
 11 the EHO, correct?
 12 A Correct. I expressed a frustration that
 13 having -- trying to engage in public processes with
 14 the county with ATAG and before it was called Missing
 15 Middle, the county demonstrated their unwillingness
 16 really to listen to reason to argument. They are --
 17 Q Mr. Ackerman, could I just --
 18 A They are -- no.
 19 Q Could I return you to my question?
 20 A No. You opened this up.
 21 THE COURT: Sir. Sir. Sir. Time-out.
 22 He's answered the question. Let's move on to the

<p style="text-align: right;">Page 144</p> <p>1 next question.</p> <p>2</p> <p>3 BY MR. SULLIVAN:</p> <p>4 Q You wrote that letter, I believe, sometime</p> <p>5 in the summer of 2022, correct? Does that sound about</p> <p>6 right?</p> <p>7 A Yes. Yes. July.</p> <p>8 Q And that was before the public hearings in</p> <p>9 January and March related to request to advertise and</p> <p>10 ultimate adoption of the amendments in 2023, correct?</p> <p>11 A I think that's correct. We hadn't seen</p> <p>12 the final action, yeah.</p> <p>13 Q But you understood at that time that what</p> <p>14 was being considered was increasing the allowable</p> <p>15 number of units in your district and other residential</p> <p>16 districts of up to six or even eight at that time of</p> <p>17 additional units on a single-family-unit lot, correct?</p> <p>18 A Yes. Yes.</p> <p>19 Q And there was no misunderstanding as that</p> <p>20 being the policy that was under consideration by the</p> <p>21 board at the time?</p> <p>22 A No. I understood exactly where the board</p>	<p style="text-align: right;">Page 146</p> <p>1 correctly?</p> <p>2 A You did.</p> <p>3 Q Did that describe what the EHO amendments</p> <p>4 did?</p> <p>5 MS. COUSLER: Objection to the extent it</p> <p>6 calls for a legal conclusion.</p> <p>7 THE COURT: The objection is overruled.</p> <p>8 He's trying to determine what this gentleman's</p> <p>9 understanding was.</p> <p>10 MR. SULLIVAN: I'll rephrase, Your Honor,</p> <p>11 just to clarify.</p> <p>12</p> <p>13 BY MR. SULLIVAN:</p> <p>14 Q That explains and summarizes accurately</p> <p>15 what was being proposed for consideration under the</p> <p>16 EHO amendments, correct?</p> <p>17 MS. COUSLER: Objection to the extent it</p> <p>18 calls for a legal conclusion about what the</p> <p>19 descriptive summary of the advertisement is.</p> <p>20 THE COURT: The objection is sustained.</p> <p>21 The first question was better about his</p> <p>22 understanding of what that meant.</p>
<p style="text-align: right;">Page 145</p> <p>1 was headed.</p> <p>2 Q And I'll refer you to -- this is in one of</p> <p>3 your notebooks. I believe Notebook 1. It's</p> <p>4 Plaintiffs' 79. Oh, it's Book 2. Sorry. 79.</p> <p>5 A I see the notice.</p> <p>6 Q And you described this as the notice --</p> <p>7 this is Plaintiffs' Exhibit A. This is the</p> <p>8 advertisement that was run after -- to notice the</p> <p>9 public hearings on adoption of the EHO amendments,</p> <p>10 correct?</p> <p>11 A Yes.</p> <p>12 Q If you turn to the third page of that</p> <p>13 document, you'll see the bolded entry starting,</p> <p>14 ZOA-2023-02?</p> <p>15 A Yes.</p> <p>16 Q And I'll just read. An ordinance to</p> <p>17 amend, reenact, and recodify the ACZO, including</p> <p>18 Articles 3, 10, 12, 13, 14, 15, 16, and 18, to</p> <p>19 establish regulations for Expanded Housing Option</p> <p>20 development (EHO) which would allow for up to six</p> <p>21 dwelling units in a building for properties zoned</p> <p>22 R-20, R-10, R-8, R-6, or R-5. Did I read that</p>	<p style="text-align: right;">Page 147</p> <p>1 BY MR. SULLIVAN:</p> <p>2 Q Well, let's return to that tact. Does</p> <p>3 what I read in terms of what was in the public notice,</p> <p>4 does that explain what your understanding of the EHO</p> <p>5 amendments were at the time?</p> <p>6 A Yes, it does.</p> <p>7 MR. SULLIVAN: No further questions.</p> <p>8 THE COURT: Redirect?</p> <p>9 MS. COUSLER: No further questions, Your</p> <p>10 Honor.</p> <p>11 THE COURT: Sir, you may step down.</p> <p>12 We will take our luncheon recess at this</p> <p>13 time until 2:50. I think that's 1:50, isn't it?</p> <p>14 (The trial recessed at 12:48 p.m. At 1:51</p> <p>15 p.m. the trial continued as follows:)</p> <p>16 THE COURT: Witness Number 10, please.</p> <p>17 MS. COUSLER: Yes. We're going to call</p> <p>18 Anne Bodine. She is waiting in the hallway.</p> <p>19 (Ms. Bodine was sworn.)</p> <p>20</p> <p>21 -----oOo-----</p> <p>22</p>

<p style="text-align: right;">Page 148</p> <p>1 ANNE BODINE, 2 called as a witness on behalf of the plaintiffs, 3 having been first duly sworn, was examined and 4 testified as follows: 5 6 DIRECT EXAMINATION 7 8 BY MS. COUSLER: 9 Q Good afternoon. Can you state your name 10 for the record, please? 11 A Anne Bodine. 12 Q Where do you live? 13 A North Edward Street in Arlington. 14 Q How long have you lived in your home? 15 A Thirty-two years. 16 Q Okay. And what neighborhood do you live 17 in? 18 A Lyon Park. 19 Q If I refer to the Expanded Housing Option 20 amendment, do you know what I'm referencing? 21 A Yes, I do. 22 Q Is it okay with you if we refer to it as</p>	<p style="text-align: right;">Page 150</p> <p>1 BY MS. COUSLER: 2 Q Do you recall what the Missing Middle 3 Housing study was about in 2019? 4 A Yes. Yes, I do. 5 Q What do you recall? 6 A I recall that the county board and staff 7 were talking about expanding housing options and they 8 were intended to provide density in between single- 9 family density levels and mid to high-rise density 10 levels. 11 Q Did you have any concerns about EHO 12 development in 2019? 13 A Yes, I did. 14 Q And what were those concerns? 15 A I didn't understand why the county thought 16 there was need to put density in these areas when we 17 hadn't -- the county hadn't defined what density could 18 be added within the playing quarters we already had. 19 MR. STARKS: Objection, Your Honor. 20 There's no foundation for that testimony. 21 THE COURT: Objection sustained. 22</p>
<p style="text-align: right;">Page 149</p> <p>1 the EHO amendment? 2 A Yes. 3 Q Do you remember when you first heard about 4 the EHO amendment? 5 A It was called Missing Middle at the time, 6 and I heard about it, I believe, in October of 2019. 7 Q 2019. Okay. What, if anything, did you 8 do after finding out about the Missing Middle in 2019? 9 A I heard about it at an event where there 10 were two speakers giving two different opinions about 11 the policy. 12 MR. STARKS: Objection to hearsay. 13 THE COURT: She hasn't testified to any 14 hearsay yet. She just indicated she heard about 15 it. Objection overruled. 16 THE WITNESS: And then -- 17 THE COURT: Just wait for the next 18 question, please. 19 THE WITNESS: I didn't think I answered. 20 Sorry. 21 22</p>	<p style="text-align: right;">Page 151</p> <p>1 BY MS. COUSLER: 2 Q What were your specific concerns about EHO 3 development? 4 A At this timeframe? 5 Q To date or, you know, in the preceding 6 years. 7 A The planning for the underlying 8 infrastructure for the added density had not taken 9 place in terms of supporting parks, libraries, rec 10 centers, schools, added transportation needs for that 11 higher population. That was the primary concern. 12 Q Did you have any concern about the tree 13 canopy? 14 MR. STARKS: Your Honor, object to this 15 line of questioning and testimony because 16 Ms. Bodine is not a plaintiff in this case, so 17 it's unclear what the relevance of these 18 questions are. 19 THE COURT: The objection is sustained at 20 this point. 21 Could you spell your last name for me? 22 THE WITNESS: B as in boy, O-D as in</p>

<p>1 David, I-N-E.</p> <p>2</p> <p>3 BY MS. COUSLER:</p> <p>4 Q Did you ever reach out to the county about</p> <p>5 the tree canopy?</p> <p>6 A Yes, I did.</p> <p>7 Q If I show you what has been marked as</p> <p>8 Plaintiffs' Exhibit 200 -- it's on the last page of</p> <p>9 the last binder.</p> <p>10 A Yes. Dated November 3rd.</p> <p>11 Q What is this?</p> <p>12 A It's an e-mail between me and one of the</p> <p>13 key staff members that had been working on this policy</p> <p>14 from 2019 until that date.</p> <p>15 Q Okay. What was the staff member's name?</p> <p>16 A Richard Tucker.</p> <p>17 Q And based on this e-mail, had you reached</p> <p>18 out to Mr. Tucker?</p> <p>19 A Yes.</p> <p>20 Q And what did you ask him?</p> <p>21 A I asked him on October 31st several</p> <p>22 questions based on information I had heard from</p>	<p>Page 152</p>	<p>1 MS. COUSLER: At this time I'd like to</p> <p>2 move this into evidence.</p> <p>3 MR. STARKS: Your Honor, we object. We</p> <p>4 did not stipulate to the admissibility of this</p> <p>5 document, and there is, frankly, no relevance to</p> <p>6 this matter, as Ms. Bodine's understanding of</p> <p>7 this tree canopy ordinance, which it appears that</p> <p>8 they're trying to get to, is not at issue in this</p> <p>9 case.</p> <p>10 THE COURT: Let me look at it.</p> <p>11 What's your response to the objection?</p> <p>12 MS. COUSLER: Yes, Your Honor. This is a</p> <p>13 public record from Richard Tucker who sent an</p> <p>14 e-mail explaining the county's position on the</p> <p>15 tree canopy, and Ms. Bodine can authenticate that</p> <p>16 this was sent and this is the e-mail that she</p> <p>17 received, and the relevance is Mr. Tucker's</p> <p>18 explanation of the tree canopy in the county's</p> <p>19 own words.</p> <p>20 MR. STARKS: Well, it seems to me that</p> <p>21 they're trying to establish a legal conclusion</p> <p>22 based on an e-mail through a lay witness, and so</p>	<p>Page 154</p>
<p>1 another colleague working on tree canopy that his</p> <p>2 colleague, who was also working on Missing Middle, had</p> <p>3 been speaking to the long-range planning commission on</p> <p>4 October 17th in somewhat specific terms but without</p> <p>5 giving details because the new plan hadn't been</p> <p>6 revealed yet, so I had asked him to clarify some of</p> <p>7 the aspects of the tree canopy that he had also been</p> <p>8 hinting at earlier when I had a Zoom meeting with him</p> <p>9 in June '24.</p> <p>10 THE COURT: Counsel, I do not have a copy</p> <p>11 of that e-mail I don't think. If you'd get me a</p> <p>12 copy, please.</p> <p>13 MS. COUSLER: Yes, Your Honor.</p> <p>14 THE COURT: Thank you. Okay. Where are</p> <p>15 we in this book?</p> <p>16 MS. COUSLER: 200. It's the very last</p> <p>17 one. It's a unique tab.</p> <p>18</p> <p>19 BY MS. COUSLER:</p> <p>20 Q Is this a fair and accurate representation</p> <p>21 of your e-mail communication with Richard Tucker?</p> <p>22 A Yes.</p>	<p>Page 153</p>	<p>1 I think it's inappropriate.</p> <p>2 THE COURT: Well, I have some concerns</p> <p>3 about how much weight I should give to this</p> <p>4 e-mail. There are going to be a lot of e-mails</p> <p>5 in any type of project like this from numerous</p> <p>6 staff members, perhaps to the public, perhaps to</p> <p>7 other staff members, stating their understanding</p> <p>8 of what the ordinance will do. Some of those</p> <p>9 e-mails are going to be correct. Some of those</p> <p>10 e-mails may not be correct. So based on the</p> <p>11 objection I've heard so far, I will overrule the</p> <p>12 objection, but I'll just state to counsel, I</p> <p>13 don't know how much weight to give this.</p> <p>14 MS. COUSLER: Yes, Your Honor. I believe</p> <p>15 we'll have other documents that show this was a</p> <p>16 consistent position the county took.</p> <p>17 Is this admitted?</p> <p>18 THE COURT: Plaintiffs' 200 will be</p> <p>19 admitted.</p> <p>20 (Marked in evidence by the court as</p> <p>21 Plaintiffs' Exhibit Number 200.)</p>	<p>Page 155</p>

<p style="text-align: right;">Page 156</p> <p>1 BY MS. COUSLER:</p> <p>2 Q And you had asked Mr. Tucker about --</p> <p>3 about the tree canopy requirement, right? And his</p> <p>4 response was, To answer your question, the builders</p> <p>5 have to meet both the Chesapeake Bay Preservation</p> <p>6 Ordinance, CBPO, tree canopy coverage standard set by</p> <p>7 state code and the proposed tree planting standard of</p> <p>8 the zoning ordinance; however, depending on the lot</p> <p>9 size, number of units, and tree species, in most cases</p> <p>10 the one-tree-per-unit zoning requirement result in</p> <p>11 more shade trees than relying solely on the 10 or 15</p> <p>12 percent CBPO standard.</p> <p>13 Do you recall that response?</p> <p>14 A Yes.</p> <p>15 Q What did you understand it to mean?</p> <p>16 MR. STARKS: Your Honor, again, I object</p> <p>17 to that. She is now going to be characterizing a</p> <p>18 position that may or may not have been taken by a</p> <p>19 member of the county staff. The e-mail says what</p> <p>20 it says. I don't know why we need a witness to</p> <p>21 talk about it.</p> <p>22 MS. COUSLER: Because we needed to</p>	<p style="text-align: right;">Page 158</p> <p>1 objection?</p> <p>2 MS. COUSLER: It's her understanding, Your</p> <p>3 Honor. We haven't gotten into any hearsay about</p> <p>4 what is asked, and as far as a legal conclusion,</p> <p>5 the county stated factual information about the</p> <p>6 intent of this. I don't know how they get to</p> <p>7 claim a legal conclusion when this is just</p> <p>8 something that they gave to the public as</p> <p>9 information.</p> <p>10 MR. STARKS: Well, either way, her</p> <p>11 understanding is not really relevant, Your Honor.</p> <p>12 THE COURT: The objection is sustained.</p> <p>13 MS. COUSLER: I have no further questions.</p> <p>14 MR. STARKS: No cross, Your Honor.</p> <p>15 THE COURT: No cross?</p> <p>16 Thank you for coming in. You are free to</p> <p>17 go.</p> <p>18 Next witness?</p> <p>19 MR. HAMPSHIRE: Next witness will be Chris</p> <p>20 Mohn.</p> <p>21 THE COURT: Well, you know, I'm not sure</p> <p>22 I'm going to take that witness now. We have a</p>
<p style="text-align: right;">Page 157</p> <p>1 authenticate the document and get it into</p> <p>2 evidence, Your Honor.</p> <p>3 THE COURT: I'm going to sustain the</p> <p>4 objection.</p> <p>5</p> <p>6 BY MS. COUSLER:</p> <p>7 Q Okay. Did you speak with any other county</p> <p>8 staff about the tree canopy?</p> <p>9 A On this date or on other dates?</p> <p>10 Q On other dates.</p> <p>11 A Yes. I had a lot of correspondence with</p> <p>12 other staff, including the head of the urban forestry</p> <p>13 office Mr. Verweij.</p> <p>14 Q What, if anything, did you come to</p> <p>15 understand based on those discussions about the</p> <p>16 county's plan for tree canopy as it related to the EHO</p> <p>17 development?</p> <p>18 MR. STARKS: Objection, Your Honor.</p> <p>19 Hearsay. And, again, asking a lay witness to</p> <p>20 opine on a legal position of the county is</p> <p>21 inappropriate.</p> <p>22 THE COURT: Any response to that</p>	<p style="text-align: right;">Page 159</p> <p>1 motion at five o'clock that may be impacted --</p> <p>2 his testimony may be impacted by that motion.</p> <p>3 MR. HAMPSHIRE: All right, sir.</p> <p>4 THE COURT: Do you have another witness?</p> <p>5 MR. HAMPSHIRE: In a way, Your Honor, what</p> <p>6 I would like to try to do is to read into the</p> <p>7 record the PES deposition that we have that we</p> <p>8 discussed. And my understanding is that's what I</p> <p>9 need to do in order to get it into evidence</p> <p>10 unless the court is willing to just accept it.</p> <p>11 THE COURT: What's your position?</p> <p>12 MR. SULLIVAN: Well, I mean, to save time</p> <p>13 we could -- and pending this, I will just give an</p> <p>14 update. I haven't had a chance to confer with</p> <p>15 counsel, but it may be possible that we do -- are</p> <p>16 able to schedule cross-examination of</p> <p>17 Ms. Morrison, so it may be appropriate to wait</p> <p>18 until that is done.</p> <p>19 THE COURT: Let's assume we have to wait</p> <p>20 for that to take place. Is there another witness</p> <p>21 available?</p> <p>22 MR. HAMPSHIRE: Your Honor, we have a</p>

<p style="text-align: right;">Page 160</p> <p>1 Mr. Quinn, who is -- I don't know that he's here 2 yet. I told him 3:30. 3 THE COURT: Well, we can take up the 4 motion in limine right now then and just do that 5 right now so we get that out of the way and then 6 we can hear all these other witnesses without 7 that impediment. 8 All right. I have reviewed the 9 submissions. At this point in the trial, we're 10 going to take up the issue of the motion in 11 limine filed by the plaintiffs. You may begin 12 your argument. 13 MR. HAMPSHIRE: Thank you, Your Honor. 14 Gifford Hampshire for the plaintiffs. This comes 15 on our motion to limit the testimony of Robert 16 Brosnan, and it comes on the heels of the court's 17 ruling, as the court noted a minute ago, with 18 respect to Mr. Mohn, who the court limited from 19 testifying as to Counts 1 and 2 of our complaint, 20 namely the initiating resolution and also whether 21 the ad complied with the code. And the court 22 ruled that Mr. Mohn's attempt to or our position</p>	<p style="text-align: right;">Page 162</p> <p>1 practices and so forth. So we suggest that those 2 are pretty much the same thing or the same -- 3 things of the same character that the court ruled 4 that Mr. Mohn could not testify to. 5 The defendants have responded that there 6 is a difference between -- they contend that 7 there's a difference between Mr. Brosnan and 8 Mr. Mohn in the sense that Mr. Brosnan will 9 testify about the consistency of past practices 10 in Arlington County, and they cited some law that 11 we don't think is applicable. Namely, that past 12 practices are relevant to whether or not a 13 locality has complied with the requirements in 14 the advertising, for example, or the initiating. 15 And for that proposition, we cite the cases of 16 Nielsen versus County Board of Arlington, and I 17 have some copies of that to hand up here I 18 believe. Ms. Cousler will get that for you. 19 But the basic distinction here, Your 20 Honor, is there's a difference between the 21 administrative delegation of power to a locality 22 and the delegation of legislative power from the</p>
<p style="text-align: right;">Page 161</p> <p>1 that he was opining on good zoning practice with 2 respect to those two counts was either not 3 helpful to the court or was essentially a legal 4 conclusion or not helpful to the court because 5 the issues were legal in nature. 6 That was my understanding of the court's 7 ruling. Yet, Mr. Brosnan would propose to do the 8 same thing, and the board has designated 9 Mr. Brosnan to talk about good zoning practice 10 and policies and compliance with those practices 11 and policies, and he would testify in his report 12 that good zoning practice does not -- good zoning 13 practices do not require distinguishing between 14 initiating resolution in an advertisement and, B, 15 the resolution to advertise unambiguously 16 initiated the EHO amendment, and C, the 17 advertising resolution unambiguously signified 18 the board's intent to modify, and the board's 19 practice of initiating amendments by advertising 20 resolution is good zoning practice and that the 21 policy alternatives provided in the advertising 22 of the EHO amendment were consistent with past</p>	<p style="text-align: right;">Page 163</p> <p>1 general assembly. It is, of course, well- 2 established that in the case of the 3 administrative delegation of power that look -- 4 that agencies have a prerogative to interpret 5 their own statutes and weight is given to that 6 determination. 7 That is different, however -- and it's 8 also the case in the Trustees of Christ and St. 9 Luke's Episcopal Church case that we have cited 10 that we have here as well, and I'm providing 11 copies to counsel. That case is 273 Va. 375, 12 382, 2007. 13 It is also true that when a locality 14 interprets its own zoning ordinance that a 15 consistent interpretation of that zoning 16 ordinance is entitled to some weight. But that's 17 not what we're talking about here. What we're 18 talking about here is the delegation of 19 legislative power from the general assembly to 20 Arlington County to initiate zoning ordinances. 21 We're not talking about compliance with an 22 Arlington County zoning ordinance requirement.</p>

<p style="text-align: right;">Page 164</p> <p>1 Under the case of Helmick versus Town of 2 Warrenton, when the general assembly delegates 3 power to a municipality for zoning, it's 4 delegating legislative, not administrative or 5 enforcement power, and so therefore -- and we are 6 also dealing also, Your Honor, with the Dillon 7 Rule, and the Dillon Rule is a rule that says, as 8 the court knows, that if a locality has a power, 9 it has to be either directly granted or 10 necessarily implied, and so Arlington County does 11 not have the power to fashion its own means of 12 complying with the state's statute, and the fact 13 that Arlington County has done it a certain way 14 for many years or Fairfax County has done it a 15 certain way for many years does not establish it 16 as a -- is not entitled to any weight, because 17 the only thing that matters is whether there has 18 been compliance with the state statute. And so, 19 therefore, it is not relevant to the issue before 20 the court as to whether Arlington County has 21 applied this practice many times before. 22 It's also not true that there's a</p>	<p style="text-align: right;">Page 166</p> <p>1 was the chief planner for Arlington County for 2 more than twenty years. He has extensive 3 experience observing the very thing that is 4 challenged by plaintiffs in this case, and it is 5 relevant to the court's inquiry how Arlington has 6 done -- taken the steps that it has taken to get 7 where we are today over and over and over again 8 in the past, and it should be of interest to the 9 court to hear that testimony from Mr. Brosnan, 10 who has extensive experience, not only seeing 11 this process through many, many times, but also 12 guiding that process and handling the -- these 13 issues and seeing these issues through the way 14 that the county witnesses who are currently with 15 the county and will testify are going to -- are 16 going to testify in the coming days at trial. 17 And as you know, Your Honor, the 18 plaintiffs' claims are not limited to the 19 interpretation or whether an initiating 20 resolution was legally valid or whether the 21 options were permitted under statute. It is 22 whether the actions taken were reasonable. And</p>
<p style="text-align: right;">Page 165</p> <p>1 distinction, as the defendants raise, between 2 Mr. Mohn's testimony about good zoning practice 3 and Mr. Brosnan's testimony. It is true at the 4 very end Mr. Mohn references a code section, but 5 the lion's share, the gravamen if you will, of 6 his opinion had to do with good zoning practice. 7 So our motion is really what's good for 8 the goose is good for the gander. If Mr. Mohn 9 cannot testify as to the initiating the 10 resolution and the Count 2, whether the ad 11 complied with the state code, nor should 12 Mr. Brosnan be able to do so. 13 And, again, the consistency of past 14 practice is not relevant under the Dillon Rule or 15 on the basic principles of the delegation of 16 legislative as opposed to administrative power, 17 and, therefore, we'd ask that Mr. Brosnan also be 18 limited from expressing opinions about Counts 1 19 and 2. 20 THE COURT: Thank you. 21 MR. STARKS: Your Honor, Mr. Brosnan has 22 been -- well, he is retired. But before that he</p>	<p style="text-align: right;">Page 167</p> <p>1 what is critical about Mr. Brosnan's testimony 2 and his report is that he is saying that 3 Arlington, which is a steward of zoning practice 4 in the Commonwealth and is frequently looked up 5 to by other jurisdictions in the Commonwealth, 6 has always operated this way. And based on that, 7 his understanding as a professional planner of 8 good zoning practice is couched in his experience 9 with Arlington. And so it's very valuable to 10 hear that from Mr. Brosnan, and his opinions -- 11 you know, I will concede that perhaps there are 12 some gray area, and I think we've pointed that 13 out in our brief to the court. We've noted that 14 where he touches on, for example, 2286, that that 15 might wade into legal waters, and that's fine if 16 Mr. Brosnan doesn't testify to that. I think 17 that his opinions still carry weight. 18 I also want to distinguish this -- I 19 understand counsel's point that -- you know, that 20 interpretation of administrative by an agency 21 administering a statute may be distinguishable, 22 you know, when you pull back in the 30,000 foot</p>

<p style="text-align: right;">Page 168</p> <p>1 view from a locality applying a statute enacted 2 by the general assembly, but I believe that 3 Justice Holmes' statement in the Eisner case 4 cited on Page 5 of our brief just stands for the 5 general principle that past practice is always 6 relevant to interpretation of a statute when the 7 statute is ambiguous.</p> <p>8 Clearly, there's some ambiguity here 9 because we're in court fighting over it, and as 10 Justice Holmes succinctly stated, A page of 11 history is worth a volume of logic, so to the 12 extent that Mr. Brosnan testifies that Arlington 13 has enacted many zoning ordinances and other -- 14 taken other zoning initiatives in the manner in 15 which it has done here today should be considered 16 by the court and will be testified to in a matter 17 that's not a legal conclusion but just an opinion 18 based on his practice in the field as the planner 19 for Arlington for many, many years.</p> <p>20 So for that reason we ask that the opinion 21 not be excluded and that Mr. Brosnan be able to 22 testify in this case.</p>	<p style="text-align: right;">Page 170</p> <p>1 mainly 2204, with respect to the advertisement, 2 and 2286, Subsection 7, with respect to the 3 initiation.</p> <p>4 THE COURT: Count 1 and 2, I'm not talking 5 about that right now. I'm talking about, 6 Couldn't his testimony and even your witness's 7 testimony be helpful in the court making a 8 decision under Count 3, which is whether the 9 board acted reasonably? You don't have to answer 10 that. That's what I'm thinking.</p> <p>11 MR. HAMPSHIRE: Well, if it's limited to 12 Count 3 and to the application of the 2284, 13 that's not our issue. Our issue is with respect 14 to Counts 1 and 2.</p> <p>15 THE COURT: I see.</p> <p>16 MR. HAMPSHIRE: And because if Mr. Mohn 17 can't testify as to Counts 1 and 2 and whether -- 18 whether -- that that was proper, then nor should 19 Mr. Brosnan be able to.</p> <p>20 THE COURT: But you also are arguing that 21 I shouldn't consider past practices at all.</p> <p>22 MR. HAMPSHIRE: Well, I think you can</p>
<p style="text-align: right;">Page 169</p> <p>1 THE COURT: Thank you.</p> <p>2 MR. HAMPSHIRE: Your Honor, again, the 3 statement from the Nielsen case relates to the 4 delegation of administrative power by congress to 5 an agency to interpret -- to enforce and 6 interpret the laws of congress.</p> <p>7 THE COURT: Well, if they've been doing it 8 this way for decades, isn't that a factor the 9 court could consider as to whether they 10 reasonably considered all of the factors in Count 11 3? That's the point that they're trying to make 12 I think is that if they've done it this way, they 13 have a vibrant community that's doing well, isn't 14 it reasonable -- isn't that one of the things the 15 court should consider as to whether the board 16 acted reasonably in response to your allegation 17 in Count 3 that they did not act reasonably?</p> <p>18 MR. HAMPSHIRE: No, sir. I respectfully 19 disagree with that. Count 3 has to do with a 20 separate statute, 2284 and 2283, as to whether or 21 not there was reasonable consideration under 22 that. We're dealing with a separate statute,</p>	<p style="text-align: right;">Page 171</p> <p>1 consider past practice with respect to 22 -- with 2 the 2284, Count 3.</p> <p>3 THE COURT: Oh, okay.</p> <p>4 MR. HAMPSHIRE: I think so. I mean, 5 because that's -- that is a -- sort of a 6 legislative sort of decision. Let me correct 7 that. I think with respect to 2283, that is also 8 a statutory provision that is dictated by the 9 general assembly, so I need to correct what I 10 just said. I do think that that statute though 11 is the subject of expert testimony. Mr. Mohn 12 will be testifying about that statute, about 13 whether there was reasonable consideration and 14 what reasonable consideration means. But our 15 motion goes to Counts 1 and 2 because that's what 16 the court has excluded from Mr. Mohn.</p> <p>17 THE COURT: All right. Any response from 18 the county?</p> <p>19 MR. STARKS: Just very briefly, Your 20 Honor. I would add to that, So Count 3 does 21 address 2284, those statutory factors, but Count 22 5 goes to whether the action was arbitrary and</p>

<p style="text-align: right;">Page 172</p> <p>1 capricious, and I think that that ought to come 2 within that umbrella of this -- the consideration 3 that was done of years and years of past 4 practice. Whether it was arbitrary or not or 5 capricious or not, I think it probably bears on 6 that as well. 7 THE COURT: I'm going to make a very 8 narrow ruling for both of these experts. They 9 cannot testify that -- any testimony that 10 involves interpreting a statute or a case -- case 11 law will be considered a conclusion of law 99 12 percent of the time, and I cannot allow that 13 testimony. If they wish to testify other than 14 that type of testimony to any count in the 15 complaint, I will -- the testimony will be 16 received by the court. 17 Now, the court reserves the right to say, 18 Yes, I receive that testimony but it's really not 19 relevant to my determination. That's my 20 prerogative, but I'm going to give both experts 21 wide latitude to tell me what they feel is 22 important with the caveat that they can't give an</p>	<p style="text-align: right;">Page 174</p> <p>1 to talk to your expert in light of the court's 2 ruling? 3 MR. HAMPSHIRE: Yes, sir. You read my 4 mind. We would like that. Thank you. 5 THE COURT: Right. We'll take a fifteen 6 or twenty-minute recess at this time. 7 (The trial recessed at 2:26 p.m. At 2:44 8 p.m. the trial continued as follows:) 9 THE COURT: Are we able to have another 10 witness at this time, counsel? 11 MR. HAMPSHIRE: Yes, sir. We have one 12 housekeeping matter to mention. Mr. Sullivan and 13 I have a joint -- and counsel have a joint 14 stipulation of uncontested facts that we've 15 agreed to here. 16 THE COURT: Is it in writing? 17 MR. HAMPSHIRE: Yes, sir. 18 MR. SULLIVAN: It has been just filed, but 19 we have a copy for Your Honor. 20 THE COURT: Thank you. You may bring it 21 forward. 22 MR. HAMPSHIRE: Thank you.</p>
<p style="text-align: right;">Page 173</p> <p>1 expert opinion, for instance, that the board 2 fully complied with the Code of Virginia as to 3 Count 1 or fully complied with the Code of 4 Virginia as to Count 2 or any other count. That 5 obviously would be a conclusion of law, and 6 experts are not allowed to opine in that fashion. 7 So rather than talking about what count is 8 excluded or what opinion is excluded, the ruling 9 is going to be that they cannot give a conclusion 10 of law and anytime they start giving an opinion 11 as to whether the county complied or did not 12 comply with the statute or whether they start 13 interpreting case law, then they're entering into 14 that realm and I would expect there would be an 15 objection from the other side and the court will 16 be sustaining that objection, so I know the 17 skilled counsel that we have before me today will 18 tailor your questions to try and avoid that, and 19 I think I'm going to leave it at that. I don't 20 want to overly restrict the experts. I want them 21 to be able to fully opine on appropriate matters. 22 Would counsel like a short recess in order</p>	<p style="text-align: right;">Page 175</p> <p>1 THE COURT: The joint stipulation of 2 uncontested facts appears to have been signed by 3 counsel for all parties, is accepted by the 4 court, and will be considered by the court. 5 Are we ready for our next witness? 6 MR. HAMPSHIRE: Yes, sir. We call Chris 7 Mohn. 8 THE COURT: Thank you. 9 (Mr. Mohn was sworn.) 10 11 -----oOo----- 12 13 CHRISTOPHER MICHAEL MOHN, 14 called as an expert witness on behalf of the 15 plaintiffs, having been first duly sworn, was examined 16 and testified as follows: 17 18 DIRECT EXAMINATION 19 20 BY MR. HAMPSHIRE: 21 Q Hello, Mr. Mohn. Will you state your name 22 for the record, please.</p>

<p style="text-align: right;">Page 176</p> <p>1 A Yes. My name is Christopher Michael Mohn.</p> <p>2 Q And where are you currently employed?</p> <p>3 A Employed with Greenway Engineering,</p> <p>4 Incorporated, as the vice president and director of</p> <p>5 planning.</p> <p>6 Q And will you give the court a brief</p> <p>7 description of your educational background?</p> <p>8 A Yes. My educational background, I have a</p> <p>9 Bachelor of Science in Urban Studies from Virginia</p> <p>10 Commonwealth University, I have a graduate certificate</p> <p>11 in public management from Shenandoah University, and a</p> <p>12 master's degree in organizational leadership from</p> <p>13 Southern New Hampshire University.</p> <p>14 Q And what is your work history?</p> <p>15 A I've been engaged in land use planning and</p> <p>16 zoning practice for the past twenty-nine years. That</p> <p>17 started with zoning enforcement work with Fairfax</p> <p>18 County and then proceeded into positions as a staff</p> <p>19 planner in Loudoun County and in Frederick County,</p> <p>20 Virginia, and culminated that stretch with being</p> <p>21 deputy planning director in Frederick County,</p> <p>22 Virginia. That was in about a nine-year stretch</p>	<p style="text-align: right;">Page 178</p> <p>1 exceptions, special use permits, proffer amendments</p> <p>2 for zoning conformance. And, also, I was responsible</p> <p>3 for managing the county zoning ordinance amendment</p> <p>4 work program, and that involved both working with the</p> <p>5 county attorney, the county administration, and the</p> <p>6 board of supervisors and its appointed -- its</p> <p>7 appointed committees to establish the annual work</p> <p>8 program for zoning ordinance amendments and then to</p> <p>9 oversee the implementation and execution of that work</p> <p>10 program with actual development and processing of</p> <p>11 zoning ordinance amendments.</p> <p>12 Q And what were the general steps in a</p> <p>13 zoning ordinance amendment on the zoning review</p> <p>14 process in Loudoun County?</p> <p>15 A Well, as I mentioned, the first step in</p> <p>16 Loudoun County was to get a topic essentially included</p> <p>17 on the board's annual work program so that staff and</p> <p>18 others were assured that it was a priority item or an</p> <p>19 item of concern that was shared by the board of</p> <p>20 supervisors. From there, we would put work programs</p> <p>21 together, initiate initial discussions with</p> <p>22 stakeholders and with the county's -- the board's</p>
<p style="text-align: right;">Page 177</p> <p>1 there.</p> <p>2 Then I proceeded into the private sector</p> <p>3 and have worked both as a consultant, a land use</p> <p>4 development consultant, with Patton Harris Rust and</p> <p>5 Bowman Consulting as the director of planning and then</p> <p>6 returned to the public sector for five years as deputy</p> <p>7 planning director -- or excuse me -- deputy zoning</p> <p>8 administrator in Loudoun County, which was the most</p> <p>9 recent time that I spent in the public sector was from</p> <p>10 2016 to 2021, and so I've been in my current position</p> <p>11 since 2021.</p> <p>12 Q Okay. With respect to your duties at</p> <p>13 Loudoun County as a deputy zoning administrator, would</p> <p>14 you provide the court with a little bit more detail</p> <p>15 about what your duties were there?</p> <p>16 A Absolutely. I was responsible -- I was</p> <p>17 one of two deputy zoning administrators. My</p> <p>18 responsibilities were with regard to administering the</p> <p>19 legislative composition or component of the zoning</p> <p>20 administration division's activities, so that involved</p> <p>21 overseeing a team of planners that reviewed all</p> <p>22 legislative applications. Rezoning, special</p>	<p style="text-align: right;">Page 179</p> <p>1 appointed zoning ordinance committee or zoning</p> <p>2 ordinance action group, which was its name when I was</p> <p>3 there, and then it would proceed after we received</p> <p>4 input to assembling an initial draft, which would then</p> <p>5 kind of set the framework for moving forward with an</p> <p>6 initiating resolution for the board of supervisors to</p> <p>7 adopt, at which point then we continued our work with</p> <p>8 the zoning ordinance committee, the planning</p> <p>9 commission, and the board of supervisors through</p> <p>10 adoption.</p> <p>11 Q And I think you've stated you've been</p> <p>12 twenty-nine years in planning; is that right?</p> <p>13 A That's correct.</p> <p>14 Q Did you also serve as a Frederick County</p> <p>15 planning commissioner?</p> <p>16 A I did. I was a planning commissioner,</p> <p>17 appointed member of the planning commission for</p> <p>18 sixteen years.</p> <p>19 Q And what kind of things did you do as a</p> <p>20 planning commissioner?</p> <p>21 A As with most planning commissions, we, you</p> <p>22 know, reviewed everything from -- or actually provided</p>

<p style="text-align: right;">Page 180</p> <p>1 recommendations to the board of supervisors on all 2 types of land use applications, whether they be 3 rezonings, conditional use permits, waivers that might 4 come through, as well as comprehensive plan 5 components, comprehensive plan amendments, zoning 6 ordinance amendments, the -- kind of the gamut of 7 items that would come through the planning department 8 and on its way to the board and would come to the 9 planning commission. 10 Additionally while I was in that role, I 11 chaired the commission's comprehensive plans and 12 programs committee and during that time was involved 13 with the five-year updates to the comprehensive plan 14 as well as some small area planning efforts. 15 Q And could you tell the court a little 16 bit -- you mentioned both Patton Harris Rust and 17 Bowman Consulting and now with Greenway Engineering. 18 What was the nature of your duties in the private 19 sector? 20 A Primarily it's providing, you know, land 21 use consulting and advisory services to clients. Each 22 of those firms is first and foremost a land</p>	<p style="text-align: right;">Page 182</p> <p>1 in Loudoun County in the zoning ordinance 2 amendment process. 3 MR. SULLIVAN: Your Honor, for the record, 4 we reiterate our objection made in the motion in 5 limine as to the lack of qualification in terms 6 of scope and diversity of experience to be 7 qualified to offer expert opinions on good zoning 8 practice from experiences outside of the very 9 narrow set of jurisdictions he's worked in. We 10 make that objection to his qualification as an 11 expert witness. 12 THE COURT: All right. That objection is 13 overruled. He will be qualified as an expert in 14 the areas counsel enumerated. 15 16 BY MR. HAMPSHIRE: 17 Q And, Mr. Mohn, can you say right now that 18 you will be offering your opinions to a reasonable 19 degree of professional certainty? The opinions that 20 you're going to give today? 21 A Yes, sir. 22 Q And we just have an agreement that's --</p>
<p style="text-align: right;">Page 181</p> <p>1 development engineering firm, and so as a land use 2 planner, as a director of planning in that context, I 3 provide entitlement support to clients in terms of 4 securing the necessary approvals from jurisdictions to 5 proceed with their site plans and development plans 6 and permitting, you know, as well as when there are 7 policy or regulatory issues that emerge, working with 8 our clients, their other consultants, and the 9 jurisdictions that the project is within to find 10 solutions, whether those might include ordinance 11 amendments themselves, policy amendments that have 12 come into play, and things of that nature. 13 Q All right. And, Mr. Mohn, have you ever 14 qualified as an expert in any court? 15 A Yes, I have. 16 Q What court was that? 17 A Loudoun County Circuit Court. 18 MR. HAMPSHIRE: Your Honor, I'd like to 19 offer Mr. Mohn as an expert in zoning -- in the 20 field of planning and zoning and especially with 21 respect to the administration of zoning ordinance 22 amendments, as he described his experience being</p>	<p style="text-align: right;">Page 183</p> <p>1 when you're giving an opinion, it's going to be to a 2 reasonable degree of professional certainty? 3 A Yes, sir. 4 Q All right. What was your assignment in 5 this case? 6 A I was asked to evaluate four items, the 7 first being to review whether Arlington County 8 followed good zoning practice by effectively adopting 9 an initiating resolution at the end stage of the 10 zoning ordinance amendment process for EHO ordinance 11 as opposed to earlier stages or beginning. 12 Secondly, I was asked whether or not -- to 13 evaluate whether or not Arlington County followed good 14 zoning practice by moving forward to public hearings 15 with an advertised ordinance that included numerous 16 options as opposed to, you know, a single set or a 17 coherent set of recommended standards. 18 I was also asked to evaluate the extent to 19 which the county conducted sufficient studies to 20 support the conclusions of the EHO amendments relative 21 to impacts to existing infrastructure, community 22 infrastructure such as roads, water and sewer</p>

<p>Page 184</p> <p>1 facilities, and similar community facilities.</p> <p>2 And finally in the context of that</p> <p>3 evaluation, whether the county followed good zoning</p> <p>4 practice in adopting an ordinance that established EHO</p> <p>5 development as a by-right use as opposed to a special</p> <p>6 use or a special exception use.</p> <p>7 Q And how did you go about your work in the</p> <p>8 case? What did you do?</p> <p>9 A Fundamentally, I reviewed everything that</p> <p>10 the county had posted publicly. That would have been</p> <p>11 very much the same information that members of the</p> <p>12 public would have been able to access and review as a</p> <p>13 part of the Missing Middle Housing study. That</p> <p>14 included specifically the staff reports and minutes of</p> <p>15 the meetings for the resolution of intent, the</p> <p>16 resolution to advertise, as well as the actual</p> <p>17 adoption of the EHO ordinance, as well as reviewing</p> <p>18 Powerpoint presentations that staff prepared and put</p> <p>19 forward at each stage, you know, of the process.</p> <p>20 The Missing Middle Housing study had three</p> <p>21 phases, and the first being community engagement, the</p> <p>22 second, you know, being development of the recommended</p>	<p>Page 186</p> <p>1 document?</p> <p>2 A Yes. These are --</p> <p>3 THE COURT: I appear to be missing Book 2.</p> <p>4 I will look again. I have 3. Thank you.</p> <p>5</p> <p>6 BY MR. HAMPSHIRE:</p> <p>7 Q All right. So Tab 84, what do you</p> <p>8 recognize that to be?</p> <p>9 A I recognize this to be the meeting minutes</p> <p>10 from the county board's public hearings for the EHO</p> <p>11 amendments.</p> <p>12 Q All right. And did you review those?</p> <p>13 A Yes.</p> <p>14 Q All right. And if you pick up Notebook 3.</p> <p>15 And I'm going to ask you to look at Tabs 85 and 86.</p> <p>16 Same question. Do you recognize those documents?</p> <p>17 A I do. They're also the meeting minutes</p> <p>18 for the carryover dates of the board public hearing.</p> <p>19 Q All right. And that's on March 21st and</p> <p>20 then 86 is March 22nd, correct?</p> <p>21 A That's correct.</p> <p>22 Q And with respect to 86, what do you</p>
<p>Page 185</p> <p>1 framework for advancing housing opportunities, and the</p> <p>2 third being the implementation phase. And at each</p> <p>3 step of the process, staff put together Powerpoint</p> <p>4 presentations and other materials to identify what it</p> <p>5 was that they had concluded from those stages, both</p> <p>6 for the public as well as for the planning commission</p> <p>7 and county board.</p> <p>8 I also reviewed the FAQs that staff had</p> <p>9 put forward as a part of the process, as well as the</p> <p>10 consultant study or consultant analysis on Missing</p> <p>11 Middle Housing alternatives, which was prepared by</p> <p>12 PES.</p> <p>13 Q And, Mr. Mohn, you have some notebooks in</p> <p>14 front of you there, and I'm going to ask you to turn</p> <p>15 to the notebook which -- Notebooks 2 and 3, if you</p> <p>16 have them in front of you. So if you'd start with</p> <p>17 Number 2.</p> <p>18 A Yep. That's a lot of notebooks.</p> <p>19 Q And I'd ask you to turn to the very last</p> <p>20 tab in that notebook. And tell me when you're there.</p> <p>21 A I'm there.</p> <p>22 Q All right. Do you recognize that</p>	<p>Page 187</p> <p>1 understand that to be?</p> <p>2 A With the meeting minutes, I mean, this was</p> <p>3 the date of adoption, and it incorporated the adopted</p> <p>4 language.</p> <p>5 Q All right. And then I would ask you to</p> <p>6 turn to Exhibit 88.</p> <p>7 And, Your Honor, these are all in evidence</p> <p>8 pursuant to our admission up front. They're part of</p> <p>9 the admitted list.</p> <p>10 THE COURT: Thank you.</p> <p>11</p> <p>12 BY MR. HAMPSHIRE:</p> <p>13 Q Do you recognize that document?</p> <p>14 A I do.</p> <p>15 Q And what is that?</p> <p>16 A This is the adopted text for the Expanded</p> <p>17 Housing Option development, Missing Middle Housing</p> <p>18 study ordinance amendment.</p> <p>19 Q And did you review that?</p> <p>20 A I did, yes.</p> <p>21 Q All right. And asking you to turn back to</p> <p>22 Notebook 2 to Tab 76. I'll ask you if you recognize</p>

<p style="text-align: right;">Page 188</p> <p>1 that document.</p> <p>2 A Yes, I do. It's the county board item for</p> <p>3 the request to advertise the public hearings for the</p> <p>4 EHO amendments.</p> <p>5 Q All right. And, Mr. Mohn, I ask you to</p> <p>6 turn to -- and I'm going to have to refer to this by</p> <p>7 the Bates stamp number at the bottom. It's a good way</p> <p>8 into the document, but you're looking for Bates Stamp</p> <p>9 03886.</p> <p>10 A Okay. Yes.</p> <p>11 Q Do you recognize that document?</p> <p>12 A I do.</p> <p>13 Q And what is that?</p> <p>14 A This is the -- what appears to be the</p> <p>15 actual resolution authorizing advertisement of the</p> <p>16 amendments.</p> <p>17 Q All right. And now I'll ask you to turn</p> <p>18 to Tab Number 77 -- Your Honor, this is also in</p> <p>19 evidence -- and ask you if you recognize that. Did</p> <p>20 you review this as well?</p> <p>21 A Yes.</p> <p>22 Q And what do you understand this to be?</p>	<p style="text-align: right;">Page 190</p> <p>1 did find that, you know, the drafting of ordinance</p> <p>2 language essentially began in the summer of 2022, and</p> <p>3 to some degree, I think there had been work done</p> <p>4 leading up to that timeframe, which would be, you</p> <p>5 know, a normal part of the process for the phases of</p> <p>6 the study in the way they were outlined by the staff,</p> <p>7 but then the actual resolution itself essentially was</p> <p>8 on the eve of adoption. To kind of put it into</p> <p>9 context, it was the end of the process of the</p> <p>10 ordinance, end of the process rather than, you know,</p> <p>11 an earlier phase or an initiating step or stage of the</p> <p>12 process.</p> <p>13 There are examples in other Northern</p> <p>14 Virginia jurisdictions that from my research and from</p> <p>15 my experience do a better job of establishing, you</p> <p>16 know, the initiating resolution earlier in the public</p> <p>17 process or the review process for ordinance amendment.</p> <p>18 Notably, you know, Loudoun County where I worked and</p> <p>19 managed that process, but also Prince William County</p> <p>20 and Fauquier County are two other jurisdictions that</p> <p>21 have a very clear initiating resolution that is</p> <p>22 earlier in the process, it signals an earlier step in</p>
<p style="text-align: right;">Page 189</p> <p>1 A This was the certification of the board's</p> <p>2 meeting on January 25th regarding the initiating or</p> <p>3 the authorization to advertise.</p> <p>4 Q All right. And so you reviewed all these</p> <p>5 materials in addition to the materials you mentioned a</p> <p>6 little while ago, correct?</p> <p>7 A That's correct.</p> <p>8 Q All right. Now, taking your first</p> <p>9 assignment, which was, as I understood you to testify,</p> <p>10 whether Arlington County applied good zoning practice</p> <p>11 in passing a resolution -- an initiating resolution</p> <p>12 end of the process rather than the beginning. How did</p> <p>13 you go about your work and what were your conclusions?</p> <p>14 A Certainly. I clearly investigated these</p> <p>15 particular documents, looking back at the project</p> <p>16 history, in particular at the staff reports that had</p> <p>17 been prepared, as well as the authorization to</p> <p>18 advertise the resolution that was adopted.</p> <p>19 I tried to identify the -- you know, be</p> <p>20 clear on timeframes relative to the other work and the</p> <p>21 process of the overall Missing Middle Housing study</p> <p>22 and the Phase 3 exercise, and in doing so, you know,</p>	<p style="text-align: right;">Page 191</p> <p>1 the process to communicate to the community</p> <p>2 effectively that an ordinance amendment is forthcoming</p> <p>3 and that to some degree it's still under development,</p> <p>4 that there's still an opportunity for the community</p> <p>5 and the public to participate in that process.</p> <p>6 Q And did you form an opinion to a</p> <p>7 reasonable degree of professional certainty whether</p> <p>8 Arlington County's process of passing a resolution at</p> <p>9 the end of the process as the ordinance is going to</p> <p>10 advertise them is or is not a good zoning practice?</p> <p>11 A From my experience, it's not a best</p> <p>12 practice in zoning administration.</p> <p>13 Q And why is that?</p> <p>14 A Again, because the initiating resolution,</p> <p>15 the initiating step does provide a discreet signal to</p> <p>16 the community that the ordinance amendment is</p> <p>17 officially underway to the extent that there may have</p> <p>18 been preliminary work, preliminary discussions that</p> <p>19 may or may not have resulted in an amendment. The</p> <p>20 initiating resolution clearly indicates that, yes, the</p> <p>21 board intends to move forward and actually adopt the</p> <p>22 amendment that's been underway.</p>

<p style="text-align: right;">Page 192</p> <p>1 The initiating resolution also serves the</p> <p>2 role of providing guardrails for staff and</p> <p>3 stakeholders that essentially targets the areas of the</p> <p>4 ordinance that are under review that are being amended</p> <p>5 so that while it doesn't, you know, preclude the</p> <p>6 process from going in different directions, normally</p> <p>7 if it did after the initiating resolution, if it went</p> <p>8 outside of that resolution, it would go back for an</p> <p>9 updated resolution. I know that's a part of the</p> <p>10 process in Loudoun. So I feel that that has been a</p> <p>11 best practice. It clearly indicates the stakeholders,</p> <p>12 how the process is unfolding, and it does establish a</p> <p>13 set of shared expectations for the community.</p> <p>14 Q And why, if at all, in your opinion does</p> <p>15 the resolution at the end of the process not do that?</p> <p>16 A I think to some degree, again, that's the</p> <p>17 end of the process. The work has been done. The</p> <p>18 engagement has been done to the extent that those who</p> <p>19 haven't been in the mix, haven't been at the table,</p> <p>20 this is essentially, you know, an indicator that --</p> <p>21 not that it's completely too late to be involved, but</p> <p>22 the substantive work has been completed, and so it's</p>	<p style="text-align: right;">Page 194</p> <p>1 Q Why is it also important to have</p> <p>2 guardrails?</p> <p>3 A Well, I think it's for everybody's -- it's</p> <p>4 in everybody's best interest that's involved in the</p> <p>5 process. For stakeholders, for the decision-makers,</p> <p>6 for staff. I can speak from personal experience that,</p> <p>7 you know, the initiating resolution was often, you</p> <p>8 know, the way to, for lack of a better phrase, herd</p> <p>9 the cats in the stakeholder process because it gave</p> <p>10 them something specific to focus on as opposed to</p> <p>11 trying to introduce in many cases, you know,</p> <p>12 potentially petty issues that are only tangentially</p> <p>13 related to the core ordinance topic. So those</p> <p>14 guardrails, again, they're not absolute in the sense</p> <p>15 that they -- there can't be change through the</p> <p>16 process, but they are helpful in guiding that process.</p> <p>17 Q And with respect to your second</p> <p>18 assignment, which as I understand from your earlier</p> <p>19 testimony to be to determine whether the advertisement</p> <p>20 in this particular case that you reviewed pursuant to</p> <p>21 your other testimony complied with good zoning</p> <p>22 practice given the nature of what was advertised.</p>
<p style="text-align: right;">Page 193</p> <p>1 not an ideal tool for informing the community, you</p> <p>2 know, that that process has formally begun.</p> <p>3 Q Does it matter in your opinion, Mr. Mohn,</p> <p>4 that the ordinance at the end of the process might</p> <p>5 provide more specificity that one could provide at the</p> <p>6 beginning of the process as to your opinions?</p> <p>7 A I think that's to be expected because it's</p> <p>8 at the end of the process. You know, an ordinance is</p> <p>9 going to be fairly well-developed at the time you're</p> <p>10 ready to advertise for public hearing. I mean, it's</p> <p>11 typically in a state where it's ready to be adopted</p> <p>12 and it's been recommended by, you know, the staff.</p> <p>13 It's in a form that is ready to move forward and to be</p> <p>14 adopted as part of the code. You know, so it would be</p> <p>15 expected at the time of advertisement you would have a</p> <p>16 detailed ordinance in place, whereas at initiating</p> <p>17 resolution, it's going to be broader in many cases.</p> <p>18 And, again, it's intended to be broad enough so that</p> <p>19 there can be work within the process to address</p> <p>20 concerns, to address input as it's being developed but</p> <p>21 specific enough that, again, it provides those</p> <p>22 guardrails for what the focus is of the amendment.</p>	<p style="text-align: right;">Page 195</p> <p>1 First of all, can -- based upon your review, can you</p> <p>2 tell the court what you discovered in terms of what</p> <p>3 was advertised?</p> <p>4 A Well, the advertisement that -- the</p> <p>5 version of the ordinance that was available at the</p> <p>6 time of advertisement still consisted of a number of</p> <p>7 options that were proposed for consideration by both</p> <p>8 the planning commission and the county board. So in</p> <p>9 many respects, there were undefined elements of the</p> <p>10 ordinance at the time that it went to advertisement.</p> <p>11 Those -- the fact that they were options was not</p> <p>12 something that was highlighted clearly in the</p> <p>13 amendment itself, so it was something that could cause</p> <p>14 confusion and lacked a degree of transparency. You</p> <p>15 know, so in effect it was really more of a framework</p> <p>16 of an ordinance as opposed to a recommendation. I</p> <p>17 think notably from my review of the Arlington County</p> <p>18 process is that it differed from the typical Arlington</p> <p>19 County zoning ordinance amendment process in the sense</p> <p>20 that the county manager typically provided a</p> <p>21 recommendation, there was recommended text. And in</p> <p>22 many cases with the options there was not a county</p>

<p style="text-align: right;">Page 196</p> <p>1 manager recommendation, which I think reflected the 2 fact that, you know, there was still significant work 3 to be done.</p> <p>4 Q Are you talking about at the time of the 5 advertisement there was no recommendation?</p> <p>6 A Correct.</p> <p>7 Q And you said a second ago it wasn't clear 8 in the amendment. Did you mean the advertisement?</p> <p>9 A I apologize. Yes. The advertisement.</p> <p>10 Q All right. And why, if at all, in your 11 opinion is it important to have a recommended 12 ordinance in the advertisement as a matter of good 13 zoning practice?</p> <p>14 A Well, as a matter of good zoning practice, 15 it's a clearer expression to the community of what it 16 is that the planning commission, and more 17 significantly the county board, will be considering 18 and that it is a recommendation based on the preceding 19 processes that the staff has agreed is an appropriate 20 recommendation to move forward for ultimate adoption.</p> <p>21 Again, it doesn't preclude the 22 introduction of options or of different approaches in</p>	<p style="text-align: right;">Page 198</p> <p>1 assignment? How did you go about your work on that 2 assignment?</p> <p>3 A Again, it was very similar to the other 4 steps in the process of reviewing the public 5 information that had been published by county staff as 6 a part of the entire Missing Middle Housing study to 7 try to ascertain the level of analysis, the steps of 8 the analysis that had been performed, what that 9 applied to, and whether or not infrastructure impacts 10 were addressed as a part of that analysis.</p> <p>11 Q Okay. And did you review the materials 12 that you previously mentioned and that we went through 13 a little while ago in that process?</p> <p>14 A Yes. In particular in looking at some of 15 these items, the published materials at the conclusion 16 of Phase 2, which was the process of formulating 17 the -- the recommended framework for moving forward 18 with the Missing Middle exercise, which also 19 incorporated the findings of the Phase 2 process, 20 which was intended to evaluate the opportunities that 21 were identified during Phase 1 during that community 22 engagement phase.</p>
<p style="text-align: right;">Page 197</p> <p>1 the context of the public hearing process, but 2 generally good zoning practice suggests that you're 3 moving forward with something that is a clear 4 recommendation from the staff.</p> <p>5 Q And so based upon your review, Mr. Mohn, 6 did you reach a conclusion or an opinion to a 7 reasonable degree of professional certainty as to 8 whether or not the advertisement in this particular 9 case complied with good zoning practice?</p> <p>10 A From my experience and opinion, no, it did 11 not.</p> <p>12 Q And is that for the reasons you just 13 stated?</p> <p>14 A Yes, sir.</p> <p>15 Q With respect to your third assignment, 16 which I understand to be to determine whether 17 Arlington County applied good zoning practice in 18 giving reasonable consideration for the impact of the 19 EHO amendments to ensure mitigation of public impacts. 20 Is that essentially correct?</p> <p>21 A That's correct.</p> <p>22 Q What did you do with respect to that</p>	<p style="text-align: right;">Page 199</p> <p>1 Q I'm going to ask you to turn to another 2 exhibit. It's Number 173, and it's in Book Number 5 3 of 9. Do you have 5 of 9 up there? You do? Okay. 4 And do you recognize this document?</p> <p>5 A Yes, I do.</p> <p>6 MR. HAMPSHIRE: Your Honor, do you have 5 7 of 9? I want to make sure.</p> <p>8 THE COURT: I do.</p> <p>9 MR. HAMPSHIRE: Okay. So we're -- and 10 just to make sure, this is also in evidence, Your 11 Honor.</p> <p>12 THE COURT: What's the number again, 13 please?</p> <p>14 MR. HAMPSHIRE: 173.</p> <p>15</p> <p>16 BY MR. HAMPSHIRE:</p> <p>17 Q And you remember looking at this document 18 during the work when you came on this case?</p> <p>19 A Yes.</p> <p>20 Q And what was important about this document 21 to you?</p> <p>22 A This document is the Phase 2 analysis and</p>

<p style="text-align: right;">Page 200</p> <p>1 rough framework Powerpoint presentation that was 2 prepared by staff dated May 2nd, 2022. This document 3 was important because, as I understood it, this was, 4 you know, an encapsulation of what the staff findings 5 were from the Phase 2 process, to include the extent 6 to which they evaluated impacts.</p> <p>7 Q Okay. And directing your attention to 8 Page 23, which is Bates Stamp Number 05109.</p> <p>9 A Yes.</p> <p>10 Q Do you remember looking at that page?</p> <p>11 A I do.</p> <p>12 Q Why was that page important to you, if at 13 all?</p> <p>14 A Well, this was certainly important because 15 this page of this presentation document speaks to the 16 impacts of the draft framework specifically. In 17 particular, the first bullet of this page where it 18 indicates that, you know, it would be resulting in 19 modest housing and population growth that was 20 geographically dispersed, that it could be 21 accommodated with existing infrastructure.</p> <p>22 Q What were your thoughts, if any, when you</p>	<p style="text-align: right;">Page 202</p> <p>1 important for you to read it into the record. It's up 2 at the top. It says, Opportunities and impacts of 3 draft framework growth management. And could you just 4 kind of read for the record the bullets there?</p> <p>5 A Sure. The -- just the first bullet?</p> <p>6 Q Yes.</p> <p>7 A Okay. The first bullet states, Modest 8 housing and population growth geographically dispersed 9 can be accommodated with existing infrastructure.</p> <p>10 Q And then the next one under that?</p> <p>11 A Sure. It has a sub-bullet, which is a net 12 increase in school enrollment estimated to be nine to 13 thirteen students per year.</p> <p>14 Q And did you go looking for support for 15 those statements?</p> <p>16 A I did, yes.</p> <p>17 Q And what did you find, if anything?</p> <p>18 A I was not able to find anything that spoke 19 specifically to community or neighborhood-level 20 infrastructure or the geographic dispersion of EHO 21 units, and I think it's notable that the EHO 22 amendments that were adopted do not, in fact, require</p>
<p style="text-align: right;">Page 201</p> <p>1 looked at this page?</p> <p>2 A You know, my initial reaction to this was, 3 you know, curiosity in terms of what the conclusion 4 was derived from, what the analysis was that was 5 prepared to support this conclusion, because it's a 6 significant statement in the context of an ordinance 7 amendment that is increasing residential density 8 potentially in residential -- existing residential 9 neighborhoods. So it was -- it was definitely an 10 interesting item to see.</p> <p>11 Q And what, if anything, did you do after 12 reviewing this page?</p> <p>13 A Well, I kept going with a deeper dive of 14 the documents that I, you know, had been able to 15 locate that the county had published relative to the 16 Missing Middle Housing study to essentially look for 17 this exact conclusion, to get a better understanding 18 of where it came from, but then also to see how it was 19 translated or applied in the context of evaluating 20 existing community infrastructure at the neighborhood 21 level.</p> <p>22 Q And for the record, I think it would be</p>	<p style="text-align: right;">Page 203</p> <p>1 dispersion geographically and so to some extent can be 2 concentrated in neighborhoods or in a single or a 3 couple neighborhoods potentially. But I did find that 4 the assessment of the population growth and the modest 5 housing growth was derived from the consultant study 6 prepared by PES.</p> <p>7 MR. SULLIVAN: Your Honor, just I'm 8 getting a little bit thrown from the opinion that 9 I understand is being expressed here. I think 10 some of his testimony is outside of the scope of 11 his disclosed expert opinion. His opinion as 12 stated as Number 3, Arlington County did not 13 apply good zoning practice by failing to complete 14 any substantive studies addressing the factors 15 established under the zoning statutes, and I'm 16 just not sure that this testimony is supportive 17 or part of that same expressed opinion that he 18 has that no studies were actually conducted.</p> <p>19 MR. HAMPSHIRE: Your Honor, that's 20 precisely what he's speaking to. He's saying 21 that he's looking for the studies that support 22 this statement in the Powerpoint.</p>

<p>Page 204</p> <p>1 THE COURT: Objection overruled.</p> <p>2</p> <p>3 BY MR. HAMPSHIRE:</p> <p>4 Q Mr. Mohn, would you turn back to Book 2</p> <p>5 and to Tab 82.</p> <p>6 And, Your Honor, this is also in evidence</p> <p>7 as well.</p> <p>8 Do you recognize this document?</p> <p>9 A I do. It is the county board report for</p> <p>10 the board of public hearings on the adoption of the</p> <p>11 Missing Middle or EHO amendments.</p> <p>12 Q Okay. And why, if at all, was this</p> <p>13 document important for you to review?</p> <p>14 A This was significant because usually or</p> <p>15 it's customary for the board report at the time of</p> <p>16 potential adoption of an ordinance amendment to</p> <p>17 incorporate, certainly by reference if not with the</p> <p>18 attachments of the report themselves, all of the</p> <p>19 supporting information that support the adoption or</p> <p>20 the board's moving forward with adoption of the</p> <p>21 amendment as proposed. In this case it also --</p> <p>22 MR. SULLIVAN: Objection, Your Honor.</p>	<p>Page 206</p> <p>1 whether there was adequate studies, and adequate</p> <p>2 studies -- he's going to explain why they're not</p> <p>3 adequate because they were never disclosed to the</p> <p>4 public.</p> <p>5 MR. SULLIVAN: And that's not an opinion</p> <p>6 that's stated in his report nor in his</p> <p>7 designation. His opinion, Your Honor, is stated</p> <p>8 that, Opinion 3 -- and this is on Page 3. I can</p> <p>9 hand up a copy to Your Honor, which has been</p> <p>10 marked as Defendants' 265. This is the</p> <p>11 plaintiffs' designation. If Your Honor turns to</p> <p>12 Page 3, Number 3, it states, Arlington County did</p> <p>13 not apply good zoning practice by failing to</p> <p>14 complete any studies addressing the factors</p> <p>15 established in Virginia Code 15.2-2284. He goes</p> <p>16 on to explain what he found were considered, but</p> <p>17 nowhere in this designation nor in his report is</p> <p>18 there any opinion stating that it is a good</p> <p>19 zoning practice and necessary as part of a normal</p> <p>20 practice to attach all the studies and all the</p> <p>21 data and all the facts that were considered by</p> <p>22 the staff in forming the staff report. That's</p>
<p>Page 205</p> <p>1 That is not an opinion that has been disclosed as</p> <p>2 to that being a consistent practice of good</p> <p>3 zoning about displaying studies. They are</p> <p>4 getting far outside of any of the opinions that</p> <p>5 were actually disclosed that would be offered as</p> <p>6 evidence from this witness. And I can hand up a</p> <p>7 copy of the expert -- of the disclosure if it</p> <p>8 would assist the court.</p> <p>9 MR. HAMPSHIRE: Your Honor, I think he was</p> <p>10 explaining -- my question was why was the</p> <p>11 document important for him to review. And this</p> <p>12 is the county board report.</p> <p>13 MR. SULLIVAN: And my objection, Your</p> <p>14 Honor, is to him offering the testimony he just</p> <p>15 did, which was to state that it was a normal</p> <p>16 practice under good zoning and planning to</p> <p>17 include all the studies and all the data that</p> <p>18 would be relied upon in the staff report. That</p> <p>19 is nowhere in his reports nor in his designation.</p> <p>20 It's not an opinion that should be admissible in</p> <p>21 this case.</p> <p>22 MR. HAMPSHIRE: Well, his report goes to</p>	<p>Page 207</p> <p>1 nowhere to be found in either his report or his</p> <p>2 designation. Under John Crane, that's</p> <p>3 inadmissible expert opinion.</p> <p>4 MR. HAMPSHIRE: Your Honor, he</p> <p>5 incorporated his expert report, and his expert</p> <p>6 report -- it says that Arlington County did not</p> <p>7 apply good zoning practice by failing to complete</p> <p>8 any substantive studies addressing the factors in</p> <p>9 15.2-2284. And he goes on to --</p> <p>10 THE COURT: Well, I understand that. And</p> <p>11 your use of the word "any" can be liberally</p> <p>12 construed. But counsel's objection is</p> <p>13 appropriate. He testified that normally all of</p> <p>14 the reports are put into this document, and that</p> <p>15 does not appear to be part of his opinion;</p> <p>16 therefore, the objection is sustained as to that</p> <p>17 answer. You may proceed with your examination.</p> <p>18 I'm not excluding his opinion. I'm just</p> <p>19 saying that that answer is inadmissible.</p> <p>20 MR. HAMPSHIRE: All right, sir.</p> <p>21</p> <p>22</p>

<p style="text-align: right;">Page 208</p> <p>1 BY MR. HAMPSHIRE:</p> <p>2 Q Mr. Mohn, I direct your attention to Page</p> <p>3 6 of this document and ask you to read the top -- the</p> <p>4 first sentence at the top of the page.</p> <p>5 A It states, Staff has considered the</p> <p>6 potential impact of this growth on existing and</p> <p>7 planned infrastructure and is confident that the</p> <p>8 capacity of systems, such as transportation, water,</p> <p>9 and sewer is adequate to accommodate modest</p> <p>10 incremental growth in these areas.</p> <p>11 Q All right. And did you see -- did you</p> <p>12 determine whether there were any studies that you</p> <p>13 found to support that statement?</p> <p>14 A From a countywide perspective, I believe</p> <p>15 the staff did outline in their staff report county-</p> <p>16 wide impacts and countywide capacities. I think they</p> <p>17 allude to traffic conditions on existing corridors.</p> <p>18 They certainly look at, in essence, the big picture</p> <p>19 perspective of community impact. What is missing from</p> <p>20 this proposal is analysis of impacts at the</p> <p>21 neighborhood level, which is ultimately where the EHO</p> <p>22 development would occur. That's the threshold level</p>	<p style="text-align: right;">Page 210</p> <p>1 A My belief is absolutely. Arlington County</p> <p>2 has the capacity to do such analysis.</p> <p>3 MR. SULLIVAN: I'd just object. This is</p> <p>4 yet another opinion that's not part of his</p> <p>5 designation nor his disclosure as to what</p> <p>6 Arlington County could have done in terms of its</p> <p>7 alternative studies. His opinion that he stated</p> <p>8 was that he -- is that no studies were conducted.</p> <p>9 MR. HAMPSHIRE: And his opinion is also</p> <p>10 that no studies were conducted at the</p> <p>11 neighborhood level in dealing with locational</p> <p>12 impacts, and so the question follows, Is that</p> <p>13 something that can be done?</p> <p>14 THE COURT: The objection is sustained as</p> <p>15 to any expert opinion as to whether Arlington</p> <p>16 County could conduct studies.</p> <p>17</p> <p>18 BY MR. HAMPSHIRE:</p> <p>19 Q But it is your opinion, Mr. Mohn, that</p> <p>20 those studies, locational impact studies, were</p> <p>21 necessary, correct?</p> <p>22 A Yes.</p>
<p style="text-align: right;">Page 209</p> <p>1 of where impact mitigation would be a concern and a</p> <p>2 legitimate concern.</p> <p>3 Q Why is that?</p> <p>4 A Ultimately, because not every neighborhood</p> <p>5 is created equally in terms of age, the age of</p> <p>6 infrastructure, especially in a community such as</p> <p>7 Arlington, which has, you know, a more extensive</p> <p>8 development cycle and is further along in its growth</p> <p>9 and development. There are the possibilities of pinch</p> <p>10 points in neighborhoods serving infrastructure that</p> <p>11 wouldn't necessarily pose a problem at the county</p> <p>12 level, but at the neighborhood level, you know, an</p> <p>13 inadequate pipe size, an over-capacity pump station,</p> <p>14 things of that nature could create a situation with</p> <p>15 the addition of additional density through EHO, and so</p> <p>16 analysis of the conditions at the neighborhood level</p> <p>17 is relevant, and it's important when you consider that</p> <p>18 that is where the impacts would be manifested.</p> <p>19 Q And based upon your experience, Mr. Mohn,</p> <p>20 do you have an opinion about whether or not such a</p> <p>21 neighborhood level analysis would be feasible by a</p> <p>22 county like Arlington? Could it be done?</p>	<p style="text-align: right;">Page 211</p> <p>1 Q And did you see anywhere that any such</p> <p>2 studies have been done?</p> <p>3 A Not in my review of the record. There was</p> <p>4 no indication that any neighborhood scale,</p> <p>5 neighborhood-level locational analysis was completed.</p> <p>6 Q All right. I'm going to -- I think you</p> <p>7 mentioned that in the course of your review, you</p> <p>8 evaluated or you looked at the PES report, correct?</p> <p>9 A Correct.</p> <p>10 Q What did you understand that to be?</p> <p>11 A That report was a -- it was both PES and,</p> <p>12 I think, with Hill Studio an evaluation of the various</p> <p>13 EHO or Missing Middle housing alternatives, and the</p> <p>14 PES aspect dealt specifically with some of the</p> <p>15 economic considerations for EHO development and the</p> <p>16 likelihood of success of the EHO development ordinance</p> <p>17 or that effort. And it also spoke to important</p> <p>18 considerations, such as pace of development and the</p> <p>19 importance of ultimately reducing the regulatory</p> <p>20 burden, frankly, on EHO development moving forward in</p> <p>21 terms of ensuring that it is a by-right process.</p> <p>22 Q And based upon your review of the PES</p>

<p style="text-align: right;">Page 212</p> <p>1 report, did you determine whether it included any</p> <p>2 studies on impact on public infrastructure at all?</p> <p>3 A Not from my review. I did not see any</p> <p>4 reference to that type of analysis.</p> <p>5 Q All right. Could you turn to Book 3 of 9.</p> <p>6 And we're looking at Tab 97. Do you recognize the</p> <p>7 document there, Tab 97?</p> <p>8 A I do.</p> <p>9 Q And what is that?</p> <p>10 A This is the PES study, the cover sheet for</p> <p>11 the PES study.</p> <p>12 MR. HAMPSHIRE: Now, Your Honor, this is</p> <p>13 not in evidence yet, and this witness cannot</p> <p>14 authenticate it, but I would like to ask him some</p> <p>15 questions about it.</p> <p>16 So if counsel's agreeable, I'd like to</p> <p>17 move it into evidence.</p> <p>18 MR. SULLIVAN: We're fine with it.</p> <p>19 MR. HAMPSHIRE: We are in agreement that</p> <p>20 it can be admitted.</p> <p>21 THE COURT: Plaintiffs' 97 shall be</p> <p>22 admitted into evidence.</p>	<p style="text-align: right;">Page 214</p> <p>1 A Again, it was delving into the analysis</p> <p>2 that had been provided, notably the PES report, the</p> <p>3 published documents by county staff, and similar items</p> <p>4 that I reviewed as a part of that.</p> <p>5 Q And what, if anything, did you conclude?</p> <p>6 A Based on the absence of neighborhood-level</p> <p>7 analysis, it would have from a professional</p> <p>8 perspective been more appropriate to deal with</p> <p>9 potential impacts and impact mitigation if EHO</p> <p>10 development had been enabled as a special exception</p> <p>11 use. That conclusion is basically, again, from the</p> <p>12 perspective of not every neighborhood is created</p> <p>13 equal. Not every neighborhood is going to be able to</p> <p>14 accommodate the impacts of EHO development in a</p> <p>15 similar fashion. Some neighborhoods may be very</p> <p>16 well-equipped to handle such development whereas</p> <p>17 others may not, and the only way to truly understand</p> <p>18 that in this absence of neighborhood-level analysis as</p> <p>19 a part of the adoption of the ordinance is through</p> <p>20 location-specific analysis as part of an EHO proposal.</p> <p>21 So that is the crux of my conclusion.</p> <p>22 Q And if you'd turn back to Exhibit 82 in</p>
<p style="text-align: right;">Page 213</p> <p>1 (Marked in evidence by the court as</p> <p>2 Plaintiffs' Exhibit Number 97.)</p> <p>3</p> <p>4 BY MR. HAMPSHIRE:</p> <p>5 Q So if I understand your opinion with</p> <p>6 respect to your third assignment, Mr. Mohn, it was</p> <p>7 that Arlington County did not apply good zoning</p> <p>8 practice with respect to having studies of public</p> <p>9 infrastructure; is that correct?</p> <p>10 A That's correct.</p> <p>11 Q And because it did not investigate</p> <p>12 locational impacts, correct?</p> <p>13 A That's correct, yes.</p> <p>14 Q With respect to your fourth assignment,</p> <p>15 can you repeat what that assignment was for the court?</p> <p>16 A Certainly. It was in the context of the</p> <p>17 analysis that was prepared to support the EHO</p> <p>18 amendments, whether it was good zoning practice for</p> <p>19 Arlington County to adopt EHO development as a by-</p> <p>20 right development option versus one that requires</p> <p>21 special exception approval.</p> <p>22 Q How did you go about your work on that?</p>	<p style="text-align: right;">Page 215</p> <p>1 Book 2 of 9. And directing your attention to Page 9.</p> <p>2 A Yes.</p> <p>3 Q Do you recall reviewing this page where it</p> <p>4 says, Zoning Mechanism: Expanded Housing Option,</p> <p>5 Section 10.4?</p> <p>6 A I do.</p> <p>7 Q And was this particular provision</p> <p>8 important to your work in your fourth assignment?</p> <p>9 A It was, because this is the mechanism, the</p> <p>10 framework for implementing the EHO development option</p> <p>11 by locating the standards and creating the EHO as a</p> <p>12 by-right use on lots less than one acre in size in the</p> <p>13 five R districts that were subject to the amendment,</p> <p>14 which was R-5, R-6, R-8, R-10, and R-20. You know,</p> <p>15 this is the mechanism that establishes it as a</p> <p>16 by-right use as opposed to one requiring special use</p> <p>17 permit approval or special exception approval.</p> <p>18 Q Directing your attention to the second</p> <p>19 paragraph, would you read that for the court starting</p> <p>20 with, Placing the regulations for?</p> <p>21 A Sure. Placing the regulations for EHO</p> <p>22 development in Article 10 rather than within the R</p>

<p style="text-align: right;">Page 216</p> <p>1 district regulations in Article 5 allows the county to 2 set zoning standards for EHO that are tailored to 3 community priorities and concerns for these housing 4 types, such as parking, trees, and development 5 patterns that are compatible with their neighborhood 6 context. While many of these standards duplicate the 7 current standards for one-family detached development, 8 e.g., height, setbacks, coverage, some standards are 9 more restrictive, e.g., maximum gross floor area, site 10 layout and design standards, modifications, and some 11 standards are less restrictive, e.g., parking 12 requirements. A summary table comparing the proposed 13 zoning standards for EHO development to current 14 one-family standards is provided as Attachment 7. 15 Q Why, if at all, was that language 16 significant to your work? 17 A Again, it was significant because this 18 does reflect largely the basis for moving forward with 19 the by-right option. Also, it speaks to the 20 development standards to ensure compatibility or 21 contextual compatibility of design but does not, 22 again, speak to the neighborhood-level impacts and how</p>	<p style="text-align: right;">Page 218</p> <p>1 an administrative process by preparing whatever 2 documentation is needed simply to secure permitting 3 and related plan approvals. So that is fundamentally 4 an administrative exercise between an applicant, their 5 representatives, and staff to process that. 6 A special exception or a special use 7 permit, that's a use that, you know, is typically 8 something that may be wanted or encouraged in a zoning 9 district but that includes impacts that may be 10 objectionable or may be problematic in certain 11 settings; therefore, the special exception process is 12 used as a way to ensure that those specific proposals 13 are evaluated for their impacts in the setting that 14 they're proposed within and also that there is a 15 public review that's a part of that process. 16 So, importantly, when that process is 17 undertaken, a couple things could happen. One, if the 18 analysis indicates that there are problems with 19 existing infrastructure in the neighborhood or serving 20 the site, there could be conditions of approval that 21 are applied to require mitigation as a part of the 22 project. And, secondly, and importantly, it does</p>
<p style="text-align: right;">Page 217</p> <p>1 they might be addressed in the context of the Article 2 10 regulations. 3 Q Did you come to understand what Article 10 4 is in the structure of the Arlington County zoning 5 ordinance in the course of your work in this case? 6 MR. SULLIVAN: Objection to the extent 7 this is getting into legal interpretation, 8 assessment of code. 9 MR. HAMPSHIRE: That's not the intent. 10 The intent is does he understand the structure of 11 the ordinance because -- 12 THE COURT: The objection is sustained. 13 14 BY MR. HAMPSHIRE: 15 Q Why in your experience, Mr. Mohn, is -- 16 well, first of all, will you tell the court in general 17 what a special exception or a special use permit 18 process is in your experience? 19 A Certainly. As distinct from a by-right 20 use, a by-right use in a zoning district is one that 21 can proceed, would be established or developed 22 pursuant to the ordinance standards in effect through</p>	<p style="text-align: right;">Page 219</p> <p>1 provide a basis for public input and then potentially 2 denial of the permit if the governing body found that 3 they could not adequately mitigate impacts through 4 conditions of approval. So it is a way of -- and in 5 my experience with special exceptions, it's a way of 6 ensuring that uses of a particular class can 7 ultimately be accommodated in the settings that 8 they're proposed within, and in particular with any 9 existing neighborhoods. 10 Q And what, if any, is the relationship 11 between your opinion that there should have been a 12 locational analysis and the failure to place this use 13 in a special use permit process? 14 A Fundamentally, it's -- it -- since this is 15 a use being proposed to increase density or it -- the 16 ordinance does increase the potential density in 17 existing neighborhoods that have historically been 18 single-family detached, it seems either -- it's one or 19 the other. You know, if you want to make it by- 20 right -- and there are good reasons to want to make it 21 by-right. I believe the PES study highlights the fact 22 that applying special exception processes, things of</p>

<p style="text-align: right;">Page 220</p> <p>1 that nature, legislative review, can prove to be, you 2 know, viewed negatively in the marketplace and that 3 some developers or property owners would not pursue 4 EHO because of the associated costs.</p> <p>5 By allowing a by-right, of course, it 6 removes some of the regulatory burden of moving 7 forward with the use, but that does kind of require 8 that up-front analysis to ensure that if this does 9 move forward by-right that the systems in place are 10 adequate to accommodate that new development. Even if 11 it's relatively marginal, again, in any given 12 neighborhood, five units could be a significant 13 impact, whereas in another neighborhood, ten units may 14 not be any issue, but the fact is the only way to know 15 that is either, one, to have done the early analysis 16 as part of the EHO process with the amendment adoption 17 process or to do so as part of site-specific proposals 18 through a special exception process.</p> <p>19 So the analysis that was conducted as a 20 part of my findings for the third item certainly 21 influenced my thinking on the fourth that had there 22 been more neighborhood-specific analysis as a part of</p>	<p style="text-align: right;">Page 222</p> <p>1 per year through a five-year period, so it would be 2 2028, and it was further broken down by zoning 3 district. So the R-5 was allocated seven permits for 4 EHO per year, R-6 could have thirty permits per year, 5 and then the balance, twenty-one, could go in the 6 other zoning districts, the other three zoning 7 districts, on an annual basis.</p> <p>8 Q And so why in your opinion wasn't that a 9 sufficient safeguard?</p> <p>10 A Well, because still within those 11 particular zoning districts, these EHO units could be 12 consolidated, they could be clustered. If a given 13 neighborhood was more desirable or positioned to 14 accommodate from a market perspective the EHO units, 15 you know, certainly there's nothing in the ordinance 16 that says that those thirty permits for the R-6 17 district have to be in multiple neighborhoods zoned 18 R-6. They could all locate in a single neighborhood 19 zoned R-6 or it could be ten this year, ten next year. 20 It really doesn't protect neighborhoods at that level.</p> <p>21 Q Did you come to have any understanding as 22 to whether or not the fifty-eight permit cap would</p>
<p style="text-align: right;">Page 221</p> <p>1 the amendment process, it would support proceeding 2 with the by-right option, if you will, for EHO.</p> <p>3 Q So at the end of the day, Mr. Mohn, did 4 you reach, based upon everything you just said, a 5 conclusion or an opinion to a reasonable degree of 6 professional certainty as to whether or not Arlington 7 County should have included the EHO process under the 8 special use permit process as opposed to by-right?</p> <p>9 A I think in the absence of the analysis at 10 the neighborhood level, proceeding with EHO as a by- 11 right development option was poor zoning practice.</p> <p>12 MR. HAMPSHIRE: The court's indulgence for 13 one second, Your Honor.</p> <p>14</p> <p>15 BY MR. HAMPSHIRE:</p> <p>16 Q Mr. Mohn, just another question. In the 17 course of your work on this fourth assignment, did you 18 come to learn whether or not there was a permit cap on 19 the issuance of the number of EHO applications per 20 year?</p> <p>21 A Yes. I mean, there is a -- as part of the 22 adopted ordinance, it's a cap of fifty-eight EHO units</p>	<p style="text-align: right;">Page 223</p> <p>1 stay in place forever or whether it would sunset?</p> <p>2 A As it's adopted in the ordinance, it would 3 sunset in 2028.</p> <p>4 Q And what's significant about that, if 5 anything, in your opinion?</p> <p>6 A Well, when it sunsets, then, of course, 7 there's no limitation on EHO permit issuance overall 8 or by zoning category. And while it may be the intent 9 today to revisit that and to potentially extend the 10 limitations, there's no guarantee that that would 11 happen. That is something that could be allowed to 12 sunset and just proceed without any regulation.</p> <p>13 Q In the course of your work on this case, 14 did you find any indication of a desire to reenact the 15 fifty-eight limit permit?</p> <p>16 A I did not find anything in --</p> <p>17 MR. SULLIVAN: Object to the foundation 18 and speculation as to the board's motivations or 19 plans for five years from now. I don't think 20 that's part of the designation or an opinion 21 that's been disclosed or that he could possibly 22 have as an expert on good zoning practices.</p>

<p style="text-align: right;">Page 224</p> <p>1 MR. HAMPSHIRE: I'm not talking about five</p> <p>2 years from now, Your Honor. I'm talking about</p> <p>3 now as to in the legislative record, it did --</p> <p>4 the question is, Was there any indication of a</p> <p>5 desire by the current board to reimpose or</p> <p>6 reenact the fifty-eight permit limit in the</p> <p>7 future?</p> <p>8 THE COURT: The objection is sustained.</p> <p>9</p> <p>10 BY MR. HAMPSHIRE:</p> <p>11 Q Mr. Mohn, you hearkened in your earlier</p> <p>12 remarks about going through your qualifications and</p> <p>13 you talked about your experience in the private</p> <p>14 sector. Do you remember that, talking about that?</p> <p>15 A Yes.</p> <p>16 Q What, in your experience, is done in the</p> <p>17 way of locational impact analysis in your work in the</p> <p>18 private sector or, for that matter, in Loudoun County</p> <p>19 as deputy zoning administrator in reviewing these</p> <p>20 applications?</p> <p>21 A Typically, when it's a proposal -- a</p> <p>22 development proposal that would result in increased</p>	<p style="text-align: right;">Page 226</p> <p>1 degree of professional certainty whether that sort of</p> <p>2 analysis was done in this case?</p> <p>3 A Based on my review of the record, it was</p> <p>4 not.</p> <p>5 MR. HAMPSHIRE: Thank you, Your Honor. No</p> <p>6 further questions.</p> <p>7 THE COURT: Thank you. Cross-examination?</p> <p>8 MR. SULLIVAN: Yes, sir. If I can have</p> <p>9 just a minute to kind of get organized here.</p> <p>10</p> <p style="text-align: center;">CROSS-EXAMINATION</p> <p>11</p> <p>12</p> <p>13 BY MR. SULLIVAN:</p> <p>14 Q Good afternoon, Mr. Mohn. How are you?</p> <p>15 A Good. How are you?</p> <p>16 Q I'm well. Thank you for asking. So I</p> <p>17 want to dive in and pick back up with the -- I think</p> <p>18 kind of where we started or plan to start in terms of</p> <p>19 the analysis under your Opinions 3 and 4, and that was</p> <p>20 sort of looking at your opinion that Arlington County</p> <p>21 did not apply good zoning practice by failing to</p> <p>22 complete any studies addressing certain factors under</p>
<p style="text-align: right;">Page 225</p> <p>1 density or in density of use if it's not a residential</p> <p>2 use, the jurisdiction requires analysis of the impacts</p> <p>3 of the proposal on the surrounding community. So we</p> <p>4 would customarily be expected to do some type of</p> <p>5 traffic analysis, also do an evaluation of the sewer</p> <p>6 and water system that serves the property, you know,</p> <p>7 as well as, depending on the type of proposal, the</p> <p>8 capacity impacts or capacity questions involving</p> <p>9 public schools and other public facilities. So that</p> <p>10 would be, you know, a normal part of the process when</p> <p>11 seeking that type of approval.</p> <p>12 Q And why, if at all, is that relevant to</p> <p>13 your review of this case?</p> <p>14 A That's a benchmark from my perspective for</p> <p>15 the type of locational analysis that needs to be</p> <p>16 understood to quantify and ensure impacts are</p> <p>17 mitigated for the EHO development option. So to me,</p> <p>18 it's simply what is the typical process for evaluating</p> <p>19 increases in density on the surrounding community and</p> <p>20 ensuring that existing residents are properly</p> <p>21 protected from potential impacts.</p> <p>22 Q And do you have an opinion to a reasonable</p>	<p style="text-align: right;">Page 227</p> <p>1 a Virginia statute related to the purposes of zoning.</p> <p>2 And you said in your report that you found that the</p> <p>3 county had not done any study or any analysis as part</p> <p>4 of the amendment process to quantify the impacts of</p> <p>5 the additional EHO density in the county's existing</p> <p>6 one-family-dwelling-unit district neighborhoods,</p> <p>7 thereby making it impossible to ensure the adequacy of</p> <p>8 the existing community infrastructure to accommodate</p> <p>9 such density.</p> <p>10 So your opinion was that no studies at all</p> <p>11 were conducted when you originally wrote your opinion</p> <p>12 in this case; is that correct?</p> <p>13 A That's correct.</p> <p>14 Q And it was once you started to actually</p> <p>15 receive discovery in the case and saw evidence of the</p> <p>16 significant amount of analysis and study that was</p> <p>17 conducted by the county staff throughout the many</p> <p>18 years of the Missing Middle Housing study that you now</p> <p>19 have shifted your opinion to be that it's not any</p> <p>20 study, not no study, no analysis. It's that it wasn't</p> <p>21 at the neighborhood level. That's where you've landed</p> <p>22 today?</p>

<p style="text-align: right;">Page 228</p> <p>1 A That's not exactly correct, no. I think 2 the -- my opinion was that analysis had not been 3 completed at the neighborhood level. And pursuant to 4 discovery, I certainly saw numerous e-mails between 5 staff, their interdepartmental team speaking to 6 different issues, particularly related to site 7 development issues. But in terms of analysis that 8 addressed those factors, no, I think reciting trends 9 and traffic on major roadways, things of that nature, 10 in my mind did not constitute analysis. That was a 11 representation of trends. Not an indication of what 12 could be accommodated.</p> <p>13 Q Let me return you to the question I'm 14 asking. This is -- you said you reviewed the 15 materials from the Missing Middle website, right?</p> <p>16 A Correct.</p> <p>17 Q Before writing your report? And we 18 referred to Exhibit 82, Page 6, that's the staff 19 report, and went over this discussion from the staff 20 in which they concluded that the impacts of EHO 21 development were going to be very minimal. And you 22 read that, right?</p>	<p style="text-align: right;">Page 230</p> <p>1 documentation, they may have been.</p> <p>2 Q Do you believe they did?</p> <p>3 A I don't know.</p> <p>4 Q Well --</p> <p>5 A I don't.</p> <p>6 Q You don't know? Okay. Well, I guess one 7 of the things that I think we agree on, Mr. Mohn, if 8 I'm understanding this is that one of the allegations 9 in the complaint was that the county failed to 10 consider the comprehensive plan, correct?</p> <p>11 A Correct.</p> <p>12 Q But you do not agree with that in terms of 13 good zoning and planning practice. I believe your 14 opinion was that the county in your review did 15 consider at the countywide level the comprehensive 16 plan, the impact of EHO, and the various elements of 17 the comprehensive plan, correct?</p> <p>18 A At a policy level.</p> <p>19 Q And that's what the comprehensive plan is, 20 right? It's a policy document?</p> <p>21 A Correct.</p> <p>22 Q So they complied with good zoning and</p>
<p style="text-align: right;">Page 229</p> <p>1 A Yes.</p> <p>2 Q Before you wrote your report?</p> <p>3 A Yes.</p> <p>4 Q And did you think that they were basing 5 that on no analysis and no study whatsoever?</p> <p>6 A I wasn't sure what they based that on, and 7 nothing was published to support those conclusions.</p> <p>8 Q Well, my question was, Did you have any 9 reason to believe that the staff had not conducted any 10 analysis or support based on what you read in the 11 staff report?</p> <p>12 A At that point I would -- again, I didn't 13 find anything in the record, so it was hard to know or 14 understand what it was they were representing other 15 than their own conclusions, which are just that. 16 Staff conclusions.</p> <p>17 Q And you think -- in your professional 18 opinion, you think the professional staff of Arlington 19 County would just be presenting their opinions in a 20 formal legal staff report to the County Board of 21 Arlington?</p> <p>22 A I think in the absence of any other</p>	<p style="text-align: right;">Page 231</p> <p>1 planning practice in your opinion in their 2 consideration of the comprehensive plan. Fair enough?</p> <p>3 A Fair enough.</p> <p>4 Q And in your experience in Loudoun County, 5 Mr. Mohn, and in Frederick and throughout your career, 6 what is the function of the staff experts in relation 7 to analysis of various policy proposals?</p> <p>8 A Well, the policy level -- it's distinct 9 from when things get to a technical level of outside 10 impact. Policy, I think staff is generally well- 11 equipped to deal with things of policy because they 12 recommend or they deal with goals, generalized 13 guidelines for achieving those goals, and do not 14 typically delve into the technical standards of 15 development or technical impacts even that would come 16 from potentially an ordinance amendment or an actual 17 development proposal.</p> <p>18 Q Let me make sure I'm understanding. So 19 your testimony is that county staff generally does not 20 have technical expertise about the areas that they 21 implement and supervise in terms of the various 22 technical systems, such as sanitary, sewer,</p>

<p style="text-align: right;">Page 232</p> <p>1 stormwater, transportation? Is that your testimony?</p> <p>2 MR. HAMPSHIRE: I'm going to object to the</p> <p>3 summary of the testimony. It's not an accurate</p> <p>4 summary.</p> <p>5 THE COURT: Objection overruled. You may</p> <p>6 answer the question.</p> <p>7 THE WITNESS: That is not what I'm saying.</p> <p>8 They do have expertise in their areas of</p> <p>9 specialization, their technical responsibilities,</p> <p>10 particularly when it comes to implementing</p> <p>11 ordinances and implementing the various programs</p> <p>12 of the jurisdiction. There's no question that</p> <p>13 they have that type of expertise.</p> <p>14</p> <p>15 BY MR. SULLIVAN:</p> <p>16 Q And they also have expertise in</p> <p>17 understanding the impact of various proposals on the</p> <p>18 systems that they oversee, correct?</p> <p>19 A Correct.</p> <p>20 Q Such as the Loudoun Water Authority. If</p> <p>21 you -- when you were at Loudoun and you wanted to know</p> <p>22 whether a proposal would impact the various systems of</p>	<p style="text-align: right;">Page 234</p> <p>1 county goals, correct?</p> <p>2 A Correct.</p> <p>3 Q And you know that that was led by Kellie</p> <p>4 Brown and Matt Ladd, who were in the planning</p> <p>5 division?</p> <p>6 A Yes.</p> <p>7 Q And that included Richard Tucker, who was</p> <p>8 a housing policy expert?</p> <p>9 A Yes.</p> <p>10 Q A part of that interdepartmental team was</p> <p>11 also Sarah Crawford, who handled transportation, who</p> <p>12 oversaw the transportation folks, Jason Papacosma on</p> <p>13 stormwater, and Jon Lawler, who was in the sanitary</p> <p>14 sewer group, right?</p> <p>15 A Correct.</p> <p>16 Q And you have no reason to doubt their</p> <p>17 expertise in their respective areas, correct?</p> <p>18 A Correct.</p> <p>19 Q You mentioned the PES study, and I guess</p> <p>20 one question just sort of focusing on that. This was</p> <p>21 an actual study that was done by a third party</p> <p>22 consultant economist, and you understood that it also</p>
<p style="text-align: right;">Page 233</p> <p>1 that authority, you would ask them, right?</p> <p>2 A That's correct.</p> <p>3 Q And they'd tell you, and you would believe</p> <p>4 them, right?</p> <p>5 A Correct.</p> <p>6 Q Because they're the experts that actually</p> <p>7 oversee that system, correct?</p> <p>8 A Yes.</p> <p>9 Q And it's good zoning and planning practice</p> <p>10 to do exactly that? To rely on the expertise of the</p> <p>11 people who actually oversee the systems that are being</p> <p>12 impacted to provide the inputs into the policymaking</p> <p>13 process, correct?</p> <p>14 A I agree with that. That being said --</p> <p>15 Q I think you answered the question,</p> <p>16 Mr. Mohn.</p> <p>17 A Okay.</p> <p>18 Q And so you would agree in your review of</p> <p>19 this record in the case that Arlington County</p> <p>20 assembled an interdepartmental team to conduct a study</p> <p>21 of impacts, along with some of the policy questions of</p> <p>22 whether the EHO development, allowing it might advance</p>	<p style="text-align: right;">Page 235</p> <p>1 included input from subcontractors, including design</p> <p>2 studio -- Hill Studio that conducted designs on</p> <p>3 various types of housing and whether they would fit on</p> <p>4 various different lots. That was part of the PES</p> <p>5 study, correct?</p> <p>6 A Yes.</p> <p>7 Q And also that included construction</p> <p>8 information from a contractor about cost of building,</p> <p>9 right?</p> <p>10 A Yes.</p> <p>11 Q And so the point of this study was not to</p> <p>12 actually understand these specific impacts. It was</p> <p>13 two-part, right? One purpose was to understand</p> <p>14 whether housing of EHO, Missing Middle Housing, would</p> <p>15 be feasible both physically and economically in terms</p> <p>16 of Arlington County, correct?</p> <p>17 A Correct.</p> <p>18 Q And then the second part of it was to</p> <p>19 understand, Well, if we do this, what could we expect</p> <p>20 the pace of redevelopment to be with EHO, correct?</p> <p>21 A Correct.</p> <p>22 Q And the PES study reached conclusions as</p>

<p style="text-align: right;">Page 236</p> <p>1 to both points, correct?</p> <p>2 A Yes.</p> <p>3 Q And Point Number 1, they found that there</p> <p>4 were lots, that there were physical possibilities for</p> <p>5 the design layouts for Missing Middle Housing to exist</p> <p>6 in residential districts in Arlington, correct?</p> <p>7 A Yes.</p> <p>8 Q And it also concluded that those units by</p> <p>9 virtue of being Missing Middle and not just single-</p> <p>10 family unit, that they could achieve lower price</p> <p>11 points than the existing trend of houses being torn</p> <p>12 down and rebuilt as larger single-family-unit homes,</p> <p>13 correct?</p> <p>14 A Yes.</p> <p>15 Q And you don't have any dispute with the</p> <p>16 validity of those findings in the study?</p> <p>17 A Correct.</p> <p>18 Q You also looked at the pace of</p> <p>19 redevelopment, correct?</p> <p>20 A Yes.</p> <p>21 Q And one of the things that they considered</p> <p>22 was, How do you know whether an EHO is going to get</p>	<p style="text-align: right;">Page 238</p> <p>1 houses, correct?</p> <p>2 A Yes.</p> <p>3 Q And so reasonable/fair to use that as a</p> <p>4 baseline to say, This is the number of houses annually</p> <p>5 that would possibly be subject to this trend where</p> <p>6 someone might decide that they want to develop an EHO,</p> <p>7 correct?</p> <p>8 MR. HAMPSHIRE: Your Honor, I need to pose</p> <p>9 an objection. This is getting outside the scope</p> <p>10 of my direct. I asked about the PES report, but</p> <p>11 I didn't go into all these details about the PES</p> <p>12 report, the growth rate and all that sort of</p> <p>13 thing.</p> <p>14 THE COURT: Objection overruled.</p> <p>15 THE WITNESS: Essentially -- I'm sorry. I</p> <p>16 lost track of your question. If you could --</p> <p>17</p> <p>18 BY MR. SULLIVAN:</p> <p>19 Q My question was just that you agreed that</p> <p>20 that was a reasonable methodology to kind of try to</p> <p>21 see whether EHOs were going -- at what rate they were</p> <p>22 going to be developed to start with a baseline of,</p>
<p style="text-align: right;">Page 237</p> <p>1 built? What's a way to approximate what might happen</p> <p>2 if this gets permitted, right?</p> <p>3 A Yes.</p> <p>4 Q And I just want to -- taking a step back,</p> <p>5 you've testified about the possibility that EHOs might</p> <p>6 all cluster together in one area or whatnot, but you</p> <p>7 would agree with me that given the layout of Arlington</p> <p>8 County, the fact that every parcel of single-family-</p> <p>9 unit property in the county is developed in some way</p> <p>10 or another, the only way an EHO gets built is if</p> <p>11 someone decides to build it. Either build it on</p> <p>12 property they own or to acquire a piece of property</p> <p>13 and then build it there, correct?</p> <p>14 A Yes.</p> <p>15 Q So the amount of EHO that's going to be</p> <p>16 possible to some extent is going to be tied to the</p> <p>17 rate at which people are selling their single-family-</p> <p>18 unit homes to people who might want to develop those</p> <p>19 pieces of property, right?</p> <p>20 A True.</p> <p>21 Q And the redevelopment rate that PES found</p> <p>22 was based on the turnover rate of single-family-unit</p>	<p style="text-align: right;">Page 239</p> <p>1 Well, how many single-family-unit homes are getting</p> <p>2 sold every year?</p> <p>3 A That is a reasonable starting point.</p> <p>4 Q And no contention that the methodology of</p> <p>5 the PES study was sound from your view</p> <p>6 methodologically in terms of giving an approximation</p> <p>7 of what you might expect to see in a world in which</p> <p>8 EHO is permitted, correct?</p> <p>9 A The methodology is outside my scope of</p> <p>10 expertise, but in reading the report, I didn't find</p> <p>11 anything that caused alarm.</p> <p>12 MR. SULLIVAN: Fair enough. Fair enough.</p> <p>13 I'd like to hand up -- and this is to save</p> <p>14 time -- just a few demonstratives and work</p> <p>15 through them. These are -- these have been</p> <p>16 marked as Defense Demonstratives 1 through 3 and</p> <p>17 they are --</p> <p>18 MR. HAMPSHIRE: Your Honor, again, this is</p> <p>19 outside the scope of my direct. I did not get</p> <p>20 into redevelopment rates or anything like that,</p> <p>21 so I think this is, again, beyond the scope.</p> <p>22 MR. SULLIVAN: So if I may, Your Honor, I</p>

<p style="text-align: right;">Page 240</p> <p>1 just wanted to mark these three, and they're 2 demonstrative exhibits. I'm not asking that they 3 be admitted into evidence, but I would like to 4 ask this expert about them because they speak to 5 the impacts, the studies that were done, and his 6 opinions about whether it was appropriate to base 7 decisions based on the impacts that were 8 considered and studied, so I think it's fair game 9 for this expert. 10 THE COURT: Objection overruled. 11 12 BY MR. SULLIVAN: 13 Q If you'll look at what's been marked as 14 Defense Demonstrative Number 1. Do you see that? 15 A Yes. 16 Q And this chart reflects a couple of 17 different attempts to visualize data. That's 18 something that I'm sure you've done in your career to 19 try to understand what big and small numbers might 20 mean in terms of visualizing them. Well, this is an 21 attempt to do so. The blue bar graph, that's 29,000 22 units. That's the number of single-family-unit</p>	<p style="text-align: right;">Page 242</p> <p>1 units, correct? 2 A True. 3 Q And if you look at what's been marked as 4 Defense Demonstrative Number 2, that's another attempt 5 to visualize this difference. Now, this may be a 6 disorienting image at first, but what it is is 29,000 7 dots, and they're all a bluish shade, and then there's 8 87 red dots that are dispersed in there. Looking at 9 that number 87, it's much smaller, almost 10 imperceptible to the larger dots of 29,000, correct? 11 A Correct. 12 Q But as I understand from your testimony, 13 you are saying that the county could not in good 14 zoning and planning practice have possibly properly 15 considered the impacts of EHO unless they did what you 16 call a localized or neighborhood-level study; is that 17 correct? 18 A Correct. 19 Q Is it your opinion, Mr. Mohn, that good 20 zoning and planning practices requires that 21 development have no impact whatsoever on the 22 community?</p>
<p style="text-align: right;">Page 241</p> <p>1 properties in the various R zones, okay? 2 A Yes. 3 Q And you know from your review of the 4 record the kind of burgundy to purple line, that's the 5 number of the single-family units. That's the 162 to 6 172 number, and then the 87, that's the number of net 7 EHO units that were projected from -- based on the PES 8 study that would occur in the county every year? 9 A Correct. 10 Q Understood? 11 A Yes. 12 Q Now, I want to get a sense -- and the 13 visualization is to try to show the number 87 -- now 14 that's a net number. That means that for that EHO to 15 be built, a single-family unit's got to go away and 16 then a new one's going to come in, right? So that's 17 what the net means. The 87 is the net new units. So 18 that's the measure of impact countywide that they had, 19 right? 20 A Correct. 21 Q Now, that line, 87, is a sliver, 22 fractions, fraction, fraction, fraction of 29,000</p>	<p style="text-align: right;">Page 243</p> <p>1 A Not at all. I mean, there are always 2 going to be impacts to some degree. 3 Q Right. And I guess if you're trying to 4 measure the impact of something that's so marginal in 5 the grand scheme of the overall communities in which 6 these are possible, what exactly do you mean in saying 7 that there would be a necessary type of study that 8 would look at neighborhood-level impacts? 9 A Well, I think, again, consistent with my 10 earlier testimony, there is no question that at a 11 countywide level, this is a small nominal amount of 12 housing and development. Where impacts would be 13 potentially felt are at the neighborhood level, and by 14 that I mean the -- you know, potentially the 15 intersection for a given neighborhood not functioning 16 at a proper level of service or a safe level of 17 service and that the introduction of additional trips 18 could exacerbate that where maintaining the status quo 19 would be more appropriate. So it's evaluating those 20 types of conditions. And, again, you know, all of 21 these neighborhoods are somewhat different depending 22 on age, age of infrastructure, things of that nature.</p>

<p style="text-align: right;">Page 244</p> <p>1 So the introduction of even what looks like a small 2 number countywide -- and I think these graphics do a 3 great job of articulating that from a countywide 4 perspective, but they don't address the reality in a 5 neighborhood that those additional units can bring 6 impacts that could be negative that can't be 7 mitigated, and that would be beyond what should be a 8 reasonable expectation.</p> <p>9 Q What is the basis for your opinion that 10 you've offered that the only way to appropriately 11 consider the potential for a by-right EHO is to 12 conduct what you call a localized or neighborhood- 13 level studies? Is that just based on your 14 professional experience or is it based on some type of 15 literature or a study that's done in accepted planning 16 practices?</p> <p>17 A Well, I think in general from a planning 18 practice perspective, impact mitigation is a 19 significant consideration, particularly when, you 20 know, there are changes in density above what has been 21 previously planned or what has been previously zoned. 22 So I think that is very much consistent with best</p>	<p style="text-align: right;">Page 246</p> <p>1 whenever it considers an amendment across the board to 2 its county zoning ordinance?</p> <p>3 A Well, if they --</p> <p>4 Q Yes or no? Do they?</p> <p>5 A No.</p> <p>6 Q No. Of course, they don't. And would you 7 agree that a given type of development can be 8 quantified in terms of whether an EHO is going to have 9 an impact? To anticipate what the impact would be? I 10 guess let me rephrase the question. If you're looking 11 from a planning perspective, you kind of make 12 assumptions that a single-family house is going to 13 demand this much water. There's going to be a number 14 associated with that on average, correct?</p> <p>15 A Sure.</p> <p>16 Q And it's going to demand this much in 17 terms of perhaps school capacity because there's this 18 new generation rate that's created to evaluate based 19 on housing units to predict how many students are 20 going to show up, right?</p> <p>21 A Sure.</p> <p>22 Q These are tools that exist that planners</p>
<p style="text-align: right;">Page 245</p> <p>1 planning practices that, you know, apply across 2 jurisdictions.</p> <p>3 Q My question is, Where are you getting it 4 from? Like, you say it's a good planning practice. 5 Where does that come from?</p> <p>6 A Well, I would say experience is a piece of 7 the puzzle. Engaging in jurisdictions, you know, that 8 require impact analysis as a standard part of the 9 development process is certainly another indicator of 10 that as a best practice and a standard practice. I 11 would also say even in -- you know, from educational 12 perspectives, the various planning continuing 13 education. But even kind of planning 101 kind of 14 courses, you know, in undergraduate and graduate-level 15 planning schools, indicate that, you know, evaluating 16 and understanding the impacts of growth and the 17 impacts of development is an important part of the 18 planning process at the local government level.</p> <p>19 Q And in Loudoun County where you have a lot 20 of significant experience that you relied on for your 21 opinions here today, does Loudoun County conduct a 22 study of every neighborhood and every localized area</p>	<p style="text-align: right;">Page 247</p> <p>1 use based on reliable statistics to try to get a sense 2 of, Well, if I'm looking at two new houses over here, 3 this is what the expected impact is going to be, 4 right?</p> <p>5 A True. Yes.</p> <p>6 Q So if you're looking at something where 7 you're seeing eighty-seven of a particular type of 8 unit -- let's just take EHO. You know that's Missing 9 Middle. It's a type of housing that's between two and 10 six units as permitted under the zoning amendment, 11 correct?</p> <p>12 A Yes.</p> <p>13 Q And so those units are going to be smaller 14 than a single-family unit, correct? For the most 15 part?</p> <p>16 A The individual unit, yes.</p> <p>17 Q The individual unit, right? So do you 18 think it would be reasonable to look at kind of the 19 impacts from some of those planning statistics and say 20 that an EHO unit might be like an apartment?</p> <p>21 A Yes.</p> <p>22 Q That would be reasonable?</p>

<p style="text-align: right;">Page 248</p> <p>1 A Sure.</p> <p>2 Q So if someone were trying to figure out</p> <p>3 what the impact of EHO might be, they might say, Well,</p> <p>4 one EHO, if it's a fourplex, it's going to be like</p> <p>5 four apartments added, right?</p> <p>6 A Right.</p> <p>7 Q That would be a reasonable approach,</p> <p>8 correct?</p> <p>9 A Yes.</p> <p>10 Q And the purpose of this impact analysis</p> <p>11 you indicated in your report was to ensure that</p> <p>12 neighborhood and community infrastructure and services</p> <p>13 have adequate capacity to accommodate the proposed</p> <p>14 increase in density, right? That's the whole point?</p> <p>15 A Correct.</p> <p>16 Q So I guess what do you -- I'm trying to</p> <p>17 get a more specific understanding of what you're</p> <p>18 envisioning in terms of what a localized study would</p> <p>19 have looked like. So how many -- you say a</p> <p>20 neighborhood level. How many homes in your</p> <p>21 understanding are in a neighborhood?</p> <p>22 A That would be dependent upon the county,</p>	<p style="text-align: right;">Page 250</p> <p>1 conduct a geographical and cultural study to figure</p> <p>2 out what the various neighborhoods were in the county</p> <p>3 to understand what that would be?</p> <p>4 A My expectation would be that they probably</p> <p>5 know what the geography, the cultural geography, the</p> <p>6 lay of the land from a neighborhood perspective is as</p> <p>7 being the local planners, so I would imagine they</p> <p>8 would have the ability to work with the community to</p> <p>9 set reasonable neighborhood boundaries, yes.</p> <p>10 Q Let me ask it this way. I'm just trying</p> <p>11 to get into a little bit of the stats that I think I'm</p> <p>12 trying to understand from you what was missing that</p> <p>13 wasn't done, right? So is there -- in Loudoun County,</p> <p>14 are there areas of the county that are more densely</p> <p>15 populated like Arlington?</p> <p>16 A There are places that are -- that have</p> <p>17 like the multimodal or transit-oriented spaces that</p> <p>18 are increasingly urbanized.</p> <p>19 Q And I guess in terms of units that are</p> <p>20 there, are we talking about neighborhoods where</p> <p>21 there's 20 houses, 50, 100, 500? What's the scale of</p> <p>22 what you mean by saying, A neighborhood level?</p>
<p style="text-align: right;">Page 249</p> <p>1 the jurisdiction, and what they would define as a</p> <p>2 neighborhood frankly.</p> <p>3 Q Does Arlington County to your</p> <p>4 understanding have a definition of what a neighborhood</p> <p>5 is?</p> <p>6 A I don't know how they define their</p> <p>7 specific neighborhoods for service delivery.</p> <p>8 Q What do you think a good planning practice</p> <p>9 would be in terms of estimating the number of homes</p> <p>10 that would be in a particular -- or in a theoretical</p> <p>11 neighborhood?</p> <p>12 A I think that it's not a straight number.</p> <p>13 I think it's a matter of, you know, what is</p> <p>14 considered, you know, a neighborhood based on its</p> <p>15 geography, based on the systems that are serving the</p> <p>16 community, based on how it's identified in the</p> <p>17 community, and then that gives you a sense or a basis</p> <p>18 for establishing boundaries that they can then be</p> <p>19 evaluated.</p> <p>20 Q So it's your testimony that in order to</p> <p>21 conduct the type of study that you think should have</p> <p>22 been conducted here, they first would have had to</p>	<p style="text-align: right;">Page 251</p> <p>1 A Well, the neighborhood -- again, it would</p> <p>2 depend largely on how the community itself would</p> <p>3 define those as a part of its process. So from my</p> <p>4 perspective, it's also what level of boundary can lend</p> <p>5 itself to the appropriate level of analysis, you know,</p> <p>6 so from a GIS perspective, Geographic Information</p> <p>7 Systems, that may be a specific -- in a greenfield</p> <p>8 type of environment, a specific planned unit</p> <p>9 development or something along those lines. In</p> <p>10 Arlington it may be a specific neighborhood that's</p> <p>11 been understood as a neighborhood and a distinct place</p> <p>12 over time that a boundary can be drawn around to</p> <p>13 evaluate the infrastructure impacts of EHO.</p> <p>14 Q Okay, Mr. Mohn. Let me just set it up</p> <p>15 then. We're in a neighborhood with 100 houses. If</p> <p>16 one of those turns over to become an EHO, do you</p> <p>17 believe that based on the basic understanding of what</p> <p>18 four apartments -- let's assume it's a fourplex -- and</p> <p>19 what four apartments are likely to cause in terms of</p> <p>20 infrastructure demand? Do you believe that it would</p> <p>21 be reasonable without conducting a specific study of</p> <p>22 that 100-house neighborhood that the mere addition of</p>

<p style="text-align: right;">Page 252</p> <p>1 one unit to become four, that it would be impossible 2 to adequately assess the potential impacts on capacity 3 and infrastructure without conducting a study? 4 A Well, I don't know that anything was done 5 to evaluate -- 6 Q That's not my question, Mr. Mohn. That's 7 not my question. My question is whether from a 8 planning perspective, could you use the very tools 9 that you just said were reasonable and appropriate to 10 estimate the expected impact of one house being 11 converted from the one house to a fourplex EHO on a 12 100-house neighborhood. Could you do that? 13 A Absolutely. And that's why it's 14 surprising that it wasn't done or at least not 15 published by the county. 16 Q Well, Mr. Mohn, I hear you advocating for 17 the plaintiffs' cause here, but I'd like you to focus 18 on the question that I'm asking so that we can get 19 through this. I think the point is that there are 20 ways to actually assess impact that can be done 21 countywide but can also be informed by what the 22 expected impact would be at that localized level,</p>	<p style="text-align: right;">Page 254</p> <p>1 correct? 2 A Yes. 3 Q And the experts who know that system and 4 analyzed the impact of the types of housing that was 5 coming, they looked at that and found no place in the 6 county in which they would have concerns about the 7 sanitary sewer system being capable of accommodating 8 the permission of EHO development, correct? 9 A From an overall perspective, yes. 10 Q Okay. Well, if you're looking at every 11 part of the county, what's the point of looking at it 12 from different directions? If you know every part of 13 the system, why would you expect there to be a 14 different localized impact when you know that every 15 part of the system has capacity to deal with the 16 growth it's expecting? 17 A There could be capacity. That doesn't 18 mean that there may not be pipe-level issues at a 19 neighborhood that could be a problem. 20 Q But you don't know the system as well as 21 Jon Lawler, who is an expert on the sanitary sewer 22 system, correct?</p>
<p style="text-align: right;">Page 253</p> <p>1 correct? 2 A A countywide analysis is not a localized 3 analysis, so I don't know how you'd get there. 4 Q Well, let's look at -- 5 A And you can use those -- so you can use 6 those same techniques, yes, to -- to do -- 7 Q Then let's -- let's look at an example 8 then. One of the things that you talk about with the 9 infrastructure, a pretty prominent one in this case, 10 is the sanitary sewer systems. Do you agree with 11 that? 12 A Sure. 13 Q Now, you know that in 2020 the county did 14 a system-wide study of every pipe in the county 15 system, including a test of its capacity and its 16 capabilities, correct? 17 A Yes. 18 Q A dynamic hydraulic model with cameras 19 monitoring and mapping and all of that stuff, right? 20 It's an impressive design, correct? 21 A Yes. 22 Q And they know every part of that system,</p>	<p style="text-align: right;">Page 255</p> <p>1 A Correct. 2 Q And you're not here offering an opinion as 3 to whether it is or is not? 4 A No. 5 Q All right. On schools, the Arlington 6 Public Schools, one of the things we talked about and 7 I think you mentioned in your report was the capacity 8 of the school system to deal with growth, correct? 9 A Yes. 10 Q And the number nine to thirteen new 11 students, that was a number that you highlighted in 12 your direct testimony as being something that you 13 found curious, correct? 14 A Yes. 15 Q Well, you know from planning that one of 16 the ways you predict future enrollment growth from a 17 development is you use a student generation ratio, 18 correct? 19 A Absolutely. 20 Q You plug in a ratio, the number of units. 21 And if you use the number eighty-seven, around about 22 that, and you plug it in, what you get is nine to</p>

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1 thirteen. Fair enough?

2 A Sure.

3 Q Now, nine to thirteen new students. Do

4 you know what the enrollment of Arlington Public

5 Schools is?

6 A No.

7 Q I'm just going to represent to you it's

8 about 28,000 students. Nine to thirteen, that's even

9 less than -- that's a similar number to the 29,000.

10 That's nothing. Nine to thirteen compared to 29,000,

11 correct?

12 A It depends on the capacity of the schools

13 serving the community or neighborhood that those

14 individual students come from. Overall you're

15 correct.

16 Q How -- I guess what I'm trying to

17 understand is, like, how close to capacity do you need

18 to be to reach a place where you think it would be

19 reasonable to assume that the permission of EHO is

20 going to make a material difference in the ability of

21 those systems to adequately serve the citizens that

22 they are designed to serve?

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1 A I think the question is whether those

2 schools or any individual school is at capacity.

3 Q And do you have a view as to your

4 understanding from review of the record as to whether

5 the Arlington Public Schools studies its capacity?

6 A Yes.

7 Q And the experts that analyze the issue and

8 provided input to the study, they did not raise

9 concerns about whether EHO development would be

10 expected to cause them a problem in serving the

11 students and parents of Arlington County, correct?

12 A Correct.

13 Q You mentioned transportation, and you

14 mentioned earlier just some areas of Loudoun that are

15 transit proximate, right? Similar to Arlington,

16 they're close to the metro. And you would agree that

17 another part of good planning is you look and you

18 estimate what's the demand going to be in terms of

19 different types of modes of transportation. Would you

20 agree that it's fair to assume that because of the

21 proximity to public transit that it would be

22 reasonable to estimate that some of the traffic impact

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1 would be reduced because people would be taking public

2 transit instead of driving on the roads?

3 A For those that are proximate, yes.

4 Q In terms of stormwater impact, you

5 understand that there was analysis done at the lot

6 level to see what the impacts would be at that level

7 in terms of the feasibility of the EHO project to

8 comply with different mitigation efforts, correct?

9 A Yes.

10 Q And under the stormwater program, the

11 expert who oversaw that concluded -- Jason Papacosma

12 concluded that the impacts would be manageable and

13 would be -- as long as they were tied to the same

14 standards as lot coverage of a single-family unit,

15 that it would be manageable impacts, correct?

16 A Correct.

17 Q So I want to turn to your Opinion 4, which

18 relates to this notion that good zoning practice

19 dictates that any increase, you know, in base zoning

20 be done through special use/special exception. I

21 guess I'm trying to understand this because it seems a

22 little bit circular to me. Who decides what the base

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1 density is in a particular area?

2 A It's what is established by the zoning

3 ordinance.

4 Q By the county?

5 A By the county, correct.

6 Q So if the county board decides that they

7 want to change what is allowable in terms of the base

8 level of development, doesn't that mean that that

9 becomes the mode of comparison? I mean, in other

10 words, how can it be that the board cannot choose to

11 increase the allowable uses in a particular district

12 without going for a special use exception? Because if

13 they decide to do that, then they don't go through the

14 special use exception process, correct?

15 A Well, it's not the county board that would

16 go through the special exception process.

17 Q Well, they would oversee that process?

18 A Correct.

19 Q With that understanding, could you answer

20 the question, please?

21 A If the board of supervisors has concluded

22 that the impacts are such that they do not need that

<p style="text-align: right;">Page 260</p> <p>1 and that they're satisfied with that, then, correct, 2 that's a choice that they've made as policymakers. 3 Q You're aware of the policy challenges that 4 face Arlington County and Loudoun and many other 5 communities in terms of the cost of housing, correct? 6 A Yes. 7 Q That's a thing that planners struggle 8 with, correct? 9 A Yes. 10 Q You would agree that we need more housing 11 supply? 12 A Yes. 13 Q And it's difficult to find places to put 14 it? 15 A True. 16 Q And in Arlington County almost 80 percent 17 of the land zoned for residential uses was previously 18 only available for single-family units, correct? 19 A Correct. 20 Q So I guess -- and you recognized in your 21 direct that the PES study found that if you were to 22 force this construction to go through a special use</p>	<p style="text-align: right;">Page 262</p> <p>1 projects that were seeking permission where there was 2 no development previously that was really at issue. 3 It was a totally new project. It wasn't a 4 consideration of a by-right development option, 5 correct? 6 A Correct. They were changes in zoning or 7 special exceptions that are permitted. 8 Q So you don't have experience in dealing as 9 a planning perspective of how you actually evaluate 10 the impacts of changing a by-right use in a 11 residential zoning district, correct? 12 A That's not correct. Many cases involve 13 changing, upzoning residential areas to another 14 residential zoning district that would permit more 15 density, and that is a pretty customary situation from 16 a planning perspective and one that I've dealt with on 17 numerous occasions, and it's not unlike the situation 18 of creating new housing opportunities that allow for 19 more density in an established single-family district. 20 Q So I guess the -- in the hypothetical 21 situation of why you fear that a localized study would 22 be necessary, it's really this clustering effect,</p>
<p style="text-align: right;">Page 261</p> <p>1 process, you would eliminate the economic opportunity 2 for anyone who'd want to build it in the first place 3 because they'd otherwise just build a mansion and make 4 their profits from that rather than going through a 5 Byzantine approval process at the board, right? 6 A True. 7 Q So doesn't your opinion effectively say, 8 Missing Middle Housing just cannot be a solution to 9 solve the housing supply crisis that's facing this 10 community? 11 A Not at all. Again, my opinion relative to 12 the special use permit and the decision to proceed 13 with it as a by-right -- EHO as a by-right use was 14 predicated more on the fact that the neighborhood- 15 level understanding of impact had not been quantified 16 and is unknown. So in the absence of that 17 information, despite the fact of the small number and 18 the big picture, the special use permit or special 19 exception process or approach was a better way to 20 manage that change in established neighborhoods. 21 Q And, again, that's based on your 22 experience in Loudoun County dealing with special</p>	<p style="text-align: right;">Page 263</p> <p>1 correct? 2 A Correct. 3 Q That all these EHOs are going to be 4 clustered in one particular area, correct? 5 A Yes. Or -- yes, in limited areas. 6 Q In limited areas. But there's nothing 7 that you're offering in terms of an opinion that gives 8 an opinion one way or the other whether that's likely 9 to happen or not, correct? 10 A No more so than PES did. They provided an 11 estimate based on their methodology, but that is what 12 their estimate is. It's not necessarily what's going 13 to happen. 14 Q Well, I think you just said you were not 15 qualified to offer opinions about the quality of their 16 work so -- 17 A You're asking me -- 18 Q -- I think, Mr. Mohn, whether you were 19 offering an opinion on that or not, and the answer to 20 the question is, No, you're not, right? 21 A No. Of course not. 22 Q I want to turn to your first opinion in</p>

<p style="text-align: right;">Page 264</p> <p>1 terms of the initiating resolution, and I think that 2 you said that -- you characterized the January 3 resolution, which was called a request to advertise, 4 as coming at the, quote, end of the process. I guess 5 my question is, That came in January. The -- you 6 understand that the Missing Middle Housing study was 7 commenced in 2019, correct? 8 A Yes. 9 Q And you said that -- one of the things I 10 think you were saying was that the role of this 11 resolution is the signal to the community that 12 language is being drafted, right? 13 A Yes. 14 Q And you would agree though that from your 15 perspective it is not unusual for staff in Loudoun to 16 start drafting zoning text even before there's the, 17 what I believe is called the ROIA, the resolution 18 of -- what does the ROIA acronym stand for again? 19 A Resolution of Intent to Amend. 20 Q Okay. There are some times that staff 21 drafts language even before that in the Loudoun 22 process, correct?</p>	<p style="text-align: right;">Page 266</p> <p>1 Q And in your study you saw that other 2 jurisdictions might use a different process, right? 3 A That is true. 4 Q Arlington is one of them? They use what's 5 called a resolution that is a request to advertise, 6 correct? 7 A Correct. 8 Q And it sets the scope of what the 9 amendments are going to be considered in the zoning 10 amendment change, correct? 11 A Yes. 12 Q And what they do is they set out a 13 scope -- and this is reflected in the minutes that you 14 addressed earlier in your testimony -- and they said, 15 This is the outer bounds of what we're going to 16 consider in the zoning text amendment, correct? 17 A Yes. 18 Q And that scoping exercise is the exact 19 same thing that you say was done in the scoping of 20 setting out the outer bounds of what's going to be 21 considered through the ROIA, right? 22 A That's true.</p>
<p style="text-align: right;">Page 265</p> <p>1 A That's consistent with my testimony, yes. 2 Q And there's nothing untoward about staff 3 drafting zoning text that's ultimately going to go 4 through a formal process of consideration by the board 5 in Loudoun, correct? 6 A Correct. 7 Q Now, you also said that one of the 8 purposes of this in your view of what is good zoning 9 practice is to scope and set guardrails on the 10 process, correct? 11 A Yes. 12 Q But one of the things about the resolution 13 in Loudoun is that it's not as if they have a separate 14 resolution to authorize advertisement, correct? 15 A That's correct. 16 Q It's included as a throwaway line that at 17 the end of the resolution, hey, and staff go advertise 18 this at the appropriate time, right? 19 A Yes. 20 Q So what Loudoun does with their 21 resolution, that's how Loudoun does it, correct? 22 A Yes.</p>	<p style="text-align: right;">Page 267</p> <p>1 Q And the other thing is that there's then a 2 process after that to then put together text, put it 3 out, notice it, and then ultimately there's public 4 hearings and the board takes action, right? 5 A Yes. 6 Q So looking at the process that Arlington 7 undertook with the Missing Middle Housing study and 8 the multiple phases and the study and the 9 collaboration, the community input, as a functional 10 matter, you would agree with me that there's really no 11 difference between what you would expect to see from a 12 good zoning perspective between what was done with the 13 Missing Middle Housing study and ones done in other 14 communities where they're considering changes to the 15 zoning ordinance amendment in the terms of broad 16 community outreach, multiple meetings, multiple 17 stages, multiple studies, and then ultimately formal 18 consideration, correct, as a functional matter? 19 A As a functional matter. 20 Q And you understood from your study that 21 Arlington is not the only jurisdiction that uses 22 what's called a resolution or request to advertise.</p>

<p>1 Fairfax County also does that too? Page 268</p> <p>2 A That's correct.</p> <p>3 Q And they don't use a ROIA, correct?</p> <p>4 A That's correct.</p> <p>5 Q But it serves a similar function, correct,</p> <p>6 of scoping out what the amendments are going to be and</p> <p>7 then setting that for what's going to be actually</p> <p>8 noticed to the public, correct?</p> <p>9 A Yes.</p> <p>10 Q And was there actually consideration or</p> <p>11 announcement by the board of action coming out of</p> <p>12 Phase 2? I think we looked at an exhibit that was a</p> <p>13 presentation in May of 2022 that talked about some of</p> <p>14 the policy conclusions, and that kind of -- under the</p> <p>15 Missing Middle Housing study, as you understand it,</p> <p>16 that kind of moved from the planning study phase into</p> <p>17 the Phase 3 of when they were going to start talking</p> <p>18 turkey on actual amendments, right?</p> <p>19 A That's correct.</p> <p>20 Q And there was board action at a public</p> <p>21 hearing, board studies where the board directed the</p> <p>22 staff to commence that work, correct?</p>	<p>Page 270</p> <p>1 Q And it was available to the public,</p> <p>2 correct?</p> <p>3 A Yes.</p> <p>4 Q You next talked about the advertisement</p> <p>5 and good zoning practice related to the public notice.</p> <p>6 Now, as I understand it, you are not talking about</p> <p>7 having options, options that are under consideration,</p> <p>8 and I just want to make sure I'm understanding your</p> <p>9 opinion. It's that there's nothing really wrong with</p> <p>10 having the board at a place where they are still</p> <p>11 considering options about a particular amendment even</p> <p>12 after -- even as they're going into the final meeting</p> <p>13 and adoption, right? That's not unusual at all?</p> <p>14 A Correct.</p> <p>15 Q And, in fact, I believe you described</p> <p>16 situations with staff, they would write another staff</p> <p>17 report in Loudoun about the different options that</p> <p>18 were considered. Some were recommended by staff, some</p> <p>19 were not. But there would be some acknowledgment in</p> <p>20 the staff report that, hey, there's options under</p> <p>21 consideration, right?</p> <p>22 A True.</p>
<p>Page 269</p> <p>1 A Yes.</p> <p>2 Q And that occurred at the time that the</p> <p>3 board was actually going to be moving into that phase</p> <p>4 of the process, correct?</p> <p>5 A That's correct.</p> <p>6 Q And under the ROIA in Loudoun, in their</p> <p>7 process it's an agenda item on the thing in the same</p> <p>8 way the consideration of the work study and the</p> <p>9 framework and direction to move into Phase 3 was an</p> <p>10 agenda item for the Arlington County Board, correct?</p> <p>11 A It's a little bit different in the context</p> <p>12 of having a prior work program to establish, which</p> <p>13 would correspond with what you're talking about, that</p> <p>14 direction to, sure, go ahead and proceed, you know,</p> <p>15 with the initial work, and then there's the resolution</p> <p>16 of intent to amend, followed by the advertisement and</p> <p>17 moving forward with public hearings. So I think that</p> <p>18 Loudoun does still have a slightly different approach</p> <p>19 in terms of how it processes from an initiating or</p> <p>20 beginning stage of the process, but you're correct,</p> <p>21 there was that direction that was published by the</p> <p>22 county board regarding next steps.</p>	<p>Page 271</p> <p>1 Q And in what you consider to be good zoning</p> <p>2 practice in Loudoun, the advertisements, the public</p> <p>3 notices, they didn't say anything about those options,</p> <p>4 correct?</p> <p>5 A That's true.</p> <p>6 Q They would not say, Hey, everybody,</p> <p>7 there's options on the table?</p> <p>8 A They would advertise the recommended</p> <p>9 ordinance.</p> <p>10 Q Just the recommended ordinance. And if</p> <p>11 you'll refer to Plaintiffs' Exhibit 79. That's the</p> <p>12 public notice that was attached to the complaint. And</p> <p>13 I believe if you -- directing your attention to the</p> <p>14 third page of that document, this is an ordinance</p> <p>15 to -- I'm sorry. Are you there, Mr. Mohn?</p> <p>16 A I am.</p> <p>17 Q Okay. You see the ZOA-2023-02? You know</p> <p>18 that well. That's a docket entry for consideration of</p> <p>19 the EHO amendments, correct?</p> <p>20 A Yes.</p> <p>21 Q Or how the docket number was referred to,</p> <p>22 correct?</p>


<p style="text-align: right;">Page 272</p> <p>1 A Yes.</p> <p>2 Q And it says, An ordinance to amend,</p> <p>3 reenact, and recodify the ACZO, including Articles 3,</p> <p>4 10, 12, 13, 14, 15, 16, and 18, to establish</p> <p>5 regulations for Expanded Housing Option development or</p> <p>6 EHO, which would allow for up to six dwelling units in</p> <p>7 a building for properties zoned R-20, R-10, R-8, R-6,</p> <p>8 or R-5. Did I read that correctly?</p> <p>9 A Yes.</p> <p>10 Q And you agree that that actually describes</p> <p>11 the policy change that was made in terms of adopting</p> <p>12 the EHO amendments to allow for more density in</p> <p>13 single-family-unit residential zones of up to six</p> <p>14 units, correct?</p> <p>15 A Yes.</p> <p>16 MR. SULLIVAN: No further questions.</p> <p>17 THE COURT: Redirect?</p> <p>18</p> <p>19 REDIRECT EXAMINATION</p> <p>20</p> <p>21 BY MR. HAMPSHIRE:</p> <p>22 Q Mr. Mohn, you discussed with Mr. Sullivan</p>	<p style="text-align: right;">Page 274</p> <p>1 developer or others in the land development process,</p> <p>2 the zoning ordinance, the subdivision ordinance, the</p> <p>3 other plan development ordinances that require</p> <p>4 amendments are the law. Those are the rules. You</p> <p>5 have to meet those in order to secure approval.</p> <p>6 MR. SULLIVAN: I'd just object to the</p> <p>7 extent this is getting into legal testimony.</p> <p>8 THE COURT: Sustained.</p> <p>9</p> <p>10 BY MR HAMPSHIRE:</p> <p>11 Q If you could stay away from the law, but</p> <p>12 you're explaining the difference from between a --</p> <p>13 from a planning point of view, a policy, and a</p> <p>14 comprehensive plan amendment, right?</p> <p>15 A Policy amendments versus ordinance</p> <p>16 amendments, correct.</p> <p>17 Q And what is significant about that in your</p> <p>18 review?</p> <p>19 A Well, typically, policy is a broader</p> <p>20 discussion in many cases. It does involve more kind</p> <p>21 of almost visualization and identification of those</p> <p>22 broader goals and objectives and working with the</p>
<p style="text-align: right;">Page 273</p> <p>1 the difference between comprehensive plan policy</p> <p>2 change and comprehensive plan amendment to substitute</p> <p>3 provisions. Can you explain that difference for the</p> <p>4 court?</p> <p>5 A Absolutely. You know, from a policy</p> <p>6 perspective, the comprehensive plan includes the --</p> <p>7 basically community goals and objectives and</p> <p>8 strategies for how to achieve those goals and</p> <p>9 objectives, to include identifying areas where future</p> <p>10 amendments of ordinances may be needed, subsequent</p> <p>11 planning may be needed, et cetera. It's a policy</p> <p>12 document. It's a guideline for policymakers as they</p> <p>13 move forward with decision-making. Especially</p> <p>14 important when considering development proposals,</p> <p>15 things of that nature.</p> <p>16 The ordinance amendment process and the</p> <p>17 zoning ordinance itself is a byproduct or should be,</p> <p>18 you know, a piece that implements the comprehensive</p> <p>19 plan and the elements of the comprehensive plan. It</p> <p>20 is different in the sense that it is codifying the</p> <p>21 standards for development in the community, and so</p> <p>22 where a policy ultimately has no legal affect on a</p>	<p style="text-align: right;">Page 275</p> <p>1 community to articulate those in a way that can then</p> <p>2 be implemented, you know, either through new</p> <p>3 development through investment by the county or</p> <p>4 jurisdiction through their capital improvement plan,</p> <p>5 through their ordinances that they adopt and apply,</p> <p>6 and provides the basis for those.</p> <p>7 Moving into the ordinance amendment</p> <p>8 process is distinct. The zoning ordinance and</p> <p>9 comprehensive plan are obviously two separate and</p> <p>10 distinct pieces of the puzzle. And while the</p> <p>11 comprehensive plan informs, the zoning ordinance and</p> <p>12 policy informs the zoning ordinance, it's ultimately a</p> <p>13 separate and distinct process to develop and process</p> <p>14 those amendments for adoption.</p> <p>15 Q And with respect to the reliance upon</p> <p>16 in-house experts -- and I believe you were speaking to</p> <p>17 Mr. Sullivan about the example of relying upon, for</p> <p>18 example, the Loudoun County Water Authority for</p> <p>19 expertise with respect to water. When it comes to an</p> <p>20 ordinance amendment, in your experience is it</p> <p>21 sufficient to rely on in-house expertise for the</p> <p>22 analysis on impacts with respect to a particular</p>

<p style="text-align: right;">Page 276</p> <p>1 ordinance amendment?</p> <p>2 A Well, I think the important piece there is</p> <p>3 that it really depends on the scope and topic of the</p> <p>4 amendment and what the potential impacts may be. In</p> <p>5 general, in-house staff, if it's a simple amendment</p> <p>6 involving, you know, setbacks or adjustments to</p> <p>7 setbacks or, you know, other design or development-</p> <p>8 related things, in many cases internal staff can be</p> <p>9 sufficient, you know, getting through the various</p> <p>10 committees of the jurisdiction.</p> <p>11 When it comes to the point of assessing</p> <p>12 the impacts of increases in density, which is</p> <p>13 something that was obviously achieved through the EHO</p> <p>14 amendments, it's not that the staff internally cannot</p> <p>15 do that. It's the question of whether the staff has</p> <p>16 put together the analysis and published that analysis</p> <p>17 to support their conclusions, and in many cases it's</p> <p>18 typical for outside consultants to assist with that,</p> <p>19 even with Frederick -- not Frederick water but Loudoun</p> <p>20 water. All of the different water and sewer</p> <p>21 authorities often engage with outside consultants to</p> <p>22 ensure that, you know, impacts will be what they</p>	<p style="text-align: right;">Page 278</p> <p>1 and the methodology that's used, I think that</p> <p>2 that could have been an equally plausible path or</p> <p>3 appropriate path so long as that analysis occurs.</p> <p>4</p> <p>5 BY MR. HAMPSHIRE:</p> <p>6 Q And with respect to the PES study -- as a</p> <p>7 matter of fact, I don't know whether you still have it</p> <p>8 there in front of you. It's Book 3 of 9, and Tab 97.</p> <p>9 A Yes.</p> <p>10 Q All right. And turning your attention to</p> <p>11 Page 9 where it says, Impact of Zoning Regulations.</p> <p>12 A Yes.</p> <p>13 Q Would you read that for the court.</p> <p>14 A Impact of zoning regulations. These</p> <p>15 models assumed development as a matter of right. If</p> <p>16 each lot would need to be approved with a special</p> <p>17 exception with approval by the planning commission and</p> <p>18 the county board, we estimate soft costs would</p> <p>19 increase by seven percentage points to account for the</p> <p>20 greater architectural, engineering, and legal fees,</p> <p>21 and the holding costs associated with an additional</p> <p>22 twelve months of approval time. We also assume that</p>
<p style="text-align: right;">Page 277</p> <p>1 anticipate and frequently rely on consultants to do</p> <p>2 that. That's also typical for traffic.</p> <p>3 Q And with respect to this particular EHO</p> <p>4 amendment, did you form an opinion about whether this</p> <p>5 was a significant amendment or insignificant amendment</p> <p>6 as to whether it might need outside consultants?</p> <p>7 MR. SULLIVAN: Objection. This is outside</p> <p>8 the scope of any proffered opinion.</p> <p>9 MR. HAMPSHIRE: Well, it's responsive to</p> <p>10 the cross-examination, Your Honor.</p> <p>11 THE COURT: Objection overruled. You may</p> <p>12 answer the question.</p> <p>13 THE WITNESS: In this case I think</p> <p>14 potential increase in density merits very</p> <p>15 specific analysis because of the potential</p> <p>16 differences in impacts to different parts of the</p> <p>17 county to the community. I think that, again,</p> <p>18 whether that's something that was done by outside</p> <p>19 consultants or by internal county staff and put</p> <p>20 together as a document or an analysis that could</p> <p>21 be validated and reviewed and checked for, you</p> <p>22 know, the assumptions that are associated with it</p>	<p style="text-align: right;">Page 279</p> <p>1 the required developer return would increase from 10</p> <p>2 percent to 12 percent for ownership products and from</p> <p>3 5.5 percent to 6 percent for rental developments to</p> <p>4 compensate for the additional risks inherent in the</p> <p>5 entitlement process. That additional cost and risk</p> <p>6 would increase costs and could change the relative</p> <p>7 appeal of different alternatives, as shown in Appendix</p> <p>8 Table A-6.</p> <p>9 Q And did -- I think you referred to this in</p> <p>10 your conversation with Mr. Sullivan, so did you view</p> <p>11 this as from your review of the legislative record,</p> <p>12 was this part of the -- as you understood it, the</p> <p>13 justification for making EHO by-right as opposed to</p> <p>14 special use permit?</p> <p>15 A Yes. I believe this was the fundamental</p> <p>16 rationale for that.</p> <p>17 Q And as a matter of good planning practice,</p> <p>18 did you view this as an adequate reason to put in a</p> <p>19 by-right as a matter of good zoning practices as</p> <p>20 opposed to a special use permit?</p> <p>21 A It's a piece of the puzzle I think but --</p> <p>22 Q Which piece?</p>

<p style="text-align: right;">Page 280</p> <p>1 A -- again, if this were -- this is a 2 legitimate conclusion that PES had of what the impacts 3 of introducing a special use permit or special 4 exception requirement to the process, what that would 5 be. I think recognizing that, recognizing that the 6 tradeoff is that you don't receive the ability to do 7 site-specific evaluations as a part of the special 8 exception process, that elevates, again, the need for 9 a bit more coherent analysis that can be applied to 10 the existing neighborhoods and the community to ensure 11 that these impacts can be accepted by-right as 12 recommended.</p> <p>13 Q And did you understand from your review of 14 this report whether PES had that charge? To evaluate 15 impacts?</p> <p>16 A I'm not aware of that.</p> <p>17 Q All right. And with respect -- and so who 18 did you understand from your review of the record had 19 that charge to determine locational impacts?</p> <p>20 A From my review of the record, it would be 21 staff.</p> <p>22 Q And what role does the county board play</p>	<p style="text-align: right;">Page 282</p> <p>1 are not functioning the way they should, the way you 2 would want them to, and that could be exacerbated by 3 additional users being on there, and I believe I 4 recall in some of the discovery documents 5 communication that Mr. Lawler pointed out that, you 6 know, getting down to the level of a pipe analysis 7 would be a costly enterprise, I think probably 8 consistent with Mr. Sullivan's opinion that given the 9 small number of units in the grand scheme of things, 10 it likely wasn't a worthwhile expense to drill down 11 into that level of detail. But that's the distinction 12 between modeling and understanding how the overall 13 system functions versus what might exist as potential 14 problems at a neighborhood scale.</p> <p>15 Q And it's your opinion that -- as I 16 understand it, that it's critical to do the 17 neighborhood-level scale analysis; is that correct?</p> <p>18 A I believe to form a baseline, yes.</p> <p>19 Q You mentioned in response to 20 Mr. Sullivan's questions about whether a neighborhood- 21 by-neighborhood-level analysis was done by Loudoun 22 County in every case. In what case is such a</p>
<p style="text-align: right;">Page 281</p> <p>1 in reviewing the impacts in your review of the record? 2 MR. SULLIVAN: Objection, Your Honor. 3 This is getting into outside of the scope of 4 either my cross or his supposed opinions, and 5 further, we'd object to the extent he's offering 6 opinions about the actual board's role and 7 consideration. 8 THE COURT: Sustained. 9 10 BY MR. HAMPSHIRE: 11 Q Mr. Sullivan talked to you about the 2020 12 dynamic, I think was the word, sanitary sewer capacity 13 analysis. Do you remember that discussion? 14 A Yes. 15 Q And I think your response was that that 16 capacity analysis does not speak to pipe-level issues. 17 What do you mean by that? 18 A What I mean is essentially that it may be 19 over -- providing an overview of the overarching 20 capacity of the system and its -- potentially its main 21 lines, things of that nature. But when you do get to 22 the neighborhood level, there may be components that</p>	<p style="text-align: right;">Page 283</p> <p>1 neighborhood-level analysis done? 2 A Well, I would make it distinct in the 3 sense of any type of proposal that would increase 4 potential density as a matter of right in existing 5 neighborhoods would be the distinction. Frankly, 6 that's not something in the jurisdictions to the west 7 that they've experienced. It's been the opposite. 8 You know, frankly, there have been greater experiences 9 with down-zonings, which have a very different impact 10 and a very different set of circumstances of concern. 11 So that analysis and also the engagement with the 12 public is pretty significant in those situations. In 13 situations where you are increasing the density or 14 where a proposal would come forward to increase 15 residential density, that would be, you know, an 16 indicator of the need to evaluate those impacts. 17 Q And was such a case at issue here? 18 A Well, that is the case of the EHO 19 amendments effectively increased or allowed an 20 increase in density in existing single-family zoning 21 districts. 22 Q And from your review of the PES report and</p>

<p style="text-align: right;">Page 284</p> <p>1 with respect to the growth rate that was assumed --</p> <p>2 turn back to that, if you would. And this time I'm</p> <p>3 going to ask you to go to Page 10 if you would.</p> <p>4 A Okay.</p> <p>5 Q And you see up there at the top it says,</p> <p>6 Impact on pace of redevelopment?</p> <p>7 A Yes.</p> <p>8 Q Would you read that for the court?</p> <p>9 A Sure. Arlington saw a total of 828 units</p> <p>10 demolished for new single-family development from 2016</p> <p>11 through 2020 with an additional 46 vacant lots</p> <p>12 developed without demolition, an average of 175 lots</p> <p>13 per year. However, that rate has slowed to less than</p> <p>14 160 lots annually during 2019 and 2020. Going</p> <p>15 forward, we project that the redevelopment pace with</p> <p>16 matter-of-right zoning would be between 160 and 190</p> <p>17 lots redeveloped annually.</p> <p>18 Q Okay. Let me stop you there. And then</p> <p>19 skip on down to the last paragraph there where it</p> <p>20 starts with Appendix Table 8. Can you read that to</p> <p>21 the court?</p> <p>22 A Yes. Appendix Table A-8 illustrates a</p>	<p style="text-align: right;">Page 286</p> <p>1 A Correct.</p> <p>2 Q And what did you understand from your</p> <p>3 review of this document, Mr. Mohn, as to whether or</p> <p>4 not these -- these 19 to 21 lots were assumed by PES</p> <p>5 to be dispersed or concentrated?</p> <p>6 A There's really no indication in the PES</p> <p>7 report. Certainly in the -- some of the staff</p> <p>8 documents, the Phase 2 Powerpoint presentation, there</p> <p>9 was a statement anticipating or indicating that those</p> <p>10 would be dispersed geographically throughout the</p> <p>11 county.</p> <p>12 Q And from a planning point of view, do you</p> <p>13 think that's a valid assumption?</p> <p>14 A I think the way the ordinance is</p> <p>15 structured, it allows for the dispersal across the</p> <p>16 zoning districts that EHO are permitted in. I think</p> <p>17 it is certainly possible that it could proceed that</p> <p>18 way. It's also equally likely for units to cluster if</p> <p>19 particular neighborhoods or streets or what have you</p> <p>20 represent a better alternative or a better approach</p> <p>21 from a business perspective for a potential developer.</p> <p>22 I think it will be determined by the market.</p>
<p style="text-align: right;">Page 285</p> <p>1 potential mix of Missing Middle Housing types based on</p> <p>2 the preceding analysis and relative returns,</p> <p>3 suggesting a potential for nineteen to twenty-one lots</p> <p>4 to be redeveloped for Missing Middle Housing annually.</p> <p>5 Those lots would then yield 94 to 108 units as shown</p> <p>6 in Table 4.</p> <p>7 Q And then if you turn over to the page</p> <p>8 which is the -- with the Bates Stamp Number 00024. Do</p> <p>9 you see that?</p> <p>10 A Yes.</p> <p>11 Q Have you seen that document before?</p> <p>12 A Yes.</p> <p>13 Q Is that the Table A-8 that's referred to</p> <p>14 on Page 10?</p> <p>15 A Yes.</p> <p>16 Q And do you see down there -- at the bottom</p> <p>17 you'll see -- on the far right-hand corner, you'll</p> <p>18 see -- well, in the middle column you'll see 19 to 21?</p> <p>19 A Correct.</p> <p>20 Q Under the lots redeveloped annually? And</p> <p>21 then in the far column you'll see the 94 to 108,</p> <p>22 correct?</p>	<p style="text-align: right;">Page 287</p> <p>1 Q Well, as a matter of planning practice, is</p> <p>2 it your opinion that Loudoun County should have</p> <p>3 determined whether or not they would be concentrated</p> <p>4 or dispersed?</p> <p>5 A Arlington County?</p> <p>6 Q Excuse me. Arlington County. Yes.</p> <p>7 MR. SULLIVAN: I'm going to object to this</p> <p>8 getting outside the scope of his disclosed</p> <p>9 opinions in terms of this issue of dispersal.</p> <p>10 THE COURT: Sustained. Strike that.</p> <p>11 Overruled. You may answer the question.</p> <p>12 THE WITNESS: I think the assumption that</p> <p>13 everything may be dispersed throughout the county</p> <p>14 is certainly a place to start from. I think that</p> <p>15 the reality is though that there is no control</p> <p>16 within the ordinance outside of the permit</p> <p>17 limitations that, you know, are set to sunset in</p> <p>18 2028 to limit or avoid concentration. So I think</p> <p>19 if the staff analysis, which it seems it was, was</p> <p>20 predicated on nominal, small kind of incremental</p> <p>21 growth that would be dispersed throughout the</p> <p>22 county, you could appreciate the conclusion that,</p>

<p style="text-align: right;">Page 288</p> <p>1 particularly on a countywide level, impacts would 2 be negligible and if, in fact, it did develop in 3 that fashion any individual neighborhood 4 shouldn't experience any impact of note. 5 That being said, the zoning ordinance that 6 was adopted and what was put forward does not 7 require that dispersion or does not prompt that 8 dispersion or prevent the clustering or 9 consolidation of the EHO development within 10 specific neighborhoods. So it's entirely 11 possible that, while the expectation may be that 12 it can happen across the county, that it could 13 indeed cluster or concentrate in specific 14 neighborhoods. 15 16 BY MR. HAMPSHIRE: 17 Q Well, as a matter of good zoning practice, 18 do you have an opinion whether or not it was likely 19 one way or the other to -- whether Arlington County 20 should have determined whether it would be dispersed 21 or concentrated before passing the EHO? 22 MR. SULLIVAN: I just want to renew the</p>	<p style="text-align: right;">Page 290</p> <p>1 BY MR. HAMPSHIRE: 2 Q I'm referring now, Mr. Mohn, to your 3 discussion with Mr. Sullivan about the advertising 4 issue and the reference to the ROIA in Loudoun County, 5 and I believe -- and that was request -- what was that 6 again? ROIA? Never mind. We'll call it ROIA. 7 A It's one of those Loudoun County acronyms. 8 Resolution of Intent to Amend. I'm sorry. 9 Q Resolution of Intent to Amend. And I 10 believe you testified that the resolution of intent to 11 amend included the authorization of the advertisement 12 at the same time; is that right? 13 A That's correct. Yes. 14 Q But it's also true, isn't it, that that 15 initiated at an earlier point in time, correct, when 16 staff was working on the ordinance; is that right? 17 A That is correct. 18 Q Why is that fundamental or why is that 19 fundamental to your opinion? 20 A Well, in the context in particular of that 21 process from a zoning practice, as it was applied 22 there, the idea was that that was a way to align</p>
<p style="text-align: right;">Page 289</p> <p>1 objection. This is not a disclosed opinion and 2 he's asking him to speculate about something he's 3 not offered any opinion on in terms of whether 4 this is likely or not. 5 MR. HAMPSHIRE: I think this is responsive 6 to the cross-examination. 7 THE COURT: The objection is overruled. 8 You may answer the question. 9 THE WITNESS: I believe through the EHO 10 ordinance amendment process, the potential for 11 concentration and the potential for clustering 12 units should have been factored into the 13 analysis, should have been factored into the 14 process more prominently. I think there was a 15 reliance on this expectation, and from what I've 16 reviewed, to support the contention that, you 17 know, this is minimal impact, that county 18 infrastructure can easily accommodate it. And, 19 again, I can't dispute that at the countywide 20 level. There's no information that was provided 21 as part of the process to indicate what 22 clustering would result in if it happened.</p>	<p style="text-align: right;">Page 291</p> <p>1 stakeholder expectations and inform stakeholders of 2 what was happening and the scope of what was 3 happening. There certainly was work completed prior 4 to a resolution of intent to amend being taken to the 5 board. That was typically what informed the 6 resolution of intent to amend and the scope that would 7 be applied moving forward in the process, but that was 8 definitely due to something that should happen more as 9 an official start to a process as opposed to kind of 10 indicating the conclusion of it. 11 Q And did you view the request to advertise 12 the conclusion of the process, of the drafting process 13 in this case, the case we're talking about? 14 A Well, the request to advertise, you know, 15 occurred in January of '23, and then the advertising 16 occurred and the adoption occurred in March of 2023. 17 So while a lot of work had been done, no doubt, on the 18 overall Missing Middle program up to that point, the 19 official process, the official ordinance amendment 20 process was essentially three months from the date of 21 the initiating resolution in that case. So to me, to 22 answer your question, yes, it's the end of the</p>

<p style="text-align: right;">Page 292</p> <p>1 process.</p> <p>2 Q In your experience in your twenty-nine</p> <p>3 years in planning, what -- what is the relative degree</p> <p>4 of opportunity for public involvement between the</p> <p>5 time -- when you compare the time between the</p> <p>6 beginning of the drafting of the ordinance to the</p> <p>7 point of advertisement on the one hand and the</p> <p>8 advertisement to public hearing on the other?</p> <p>9 A Typically, the advertisement for an</p> <p>10 ordinance amendment would occur, you know, at that</p> <p>11 point when the recommended text is ready to be adopted</p> <p>12 and to move forward for the planning commission and</p> <p>13 board. That's very much a stage of the process where</p> <p>14 a considerable amount of work has been done, and there</p> <p>15 should be public engagement that's a part of preparing</p> <p>16 those drafts and getting to the recommended text.</p> <p>17 At the point of advertisement, there still</p> <p>18 is opportunity for public engagement. That's by</p> <p>19 design. There are public hearings at both the</p> <p>20 planning commission and the board of supervisors to</p> <p>21 consider and potentially change -- make changes to the</p> <p>22 proposed text as they see fit based on input at that</p>	<p style="text-align: right;">Page 294</p> <p>(The trial recessed at 5:11 p.m., July 9, 2024, until 10:00 a.m., July 10, 2024.)</p> <p style="text-align: center;">-----oOo-----</p>
<p style="text-align: right;">Page 293</p> <p>1 stage. Ideally from a planning perspective and in</p> <p>2 good practice, you've spent several months at least</p> <p>3 working with stakeholders and appointed</p> <p>4 representatives on committees from the planning</p> <p>5 commissioning board to develop that recommended draft</p> <p>6 that goes forward so that there would be opportunities</p> <p>7 of engagement prior to that -- that advertising phase.</p> <p>8 Q And what role does the initiating</p> <p>9 resolution in Loudoun County or Prince William County</p> <p>10 or Fauquier County play in terms of promoting that</p> <p>11 public engagement?</p> <p>12 A Well, again, it's the -- it's the --</p> <p>13 THE COURT: You're now covering material</p> <p>14 that was covered on direct.</p> <p>15 MR. HAMPSHIRE: All right, sir. Thank</p> <p>16 you.</p> <p>17 THE COURT: Anything else?</p> <p>18 MR. HAMPSHIRE: That's it. Thank you.</p> <p>19 THE COURT: That's enough? Okay. Thank</p> <p>20 you.</p> <p>21 We will recess at this time and start</p> <p>22 tomorrow at ten o'clock. The court is in recess.</p>	<p style="text-align: right;">Page 295</p> <p style="text-align: center;">REPORTER'S CERTIFICATE</p> <p>COMMONWEALTH OF VIRGINIA, COUNTY OF ARLINGTON, to-wit:</p> <p>I, Angela D. Robinson, certify that the foregoing is a correct transcript of the proceedings had before the said court on the date aforementioned.</p> <p>Given under my hand this 20th day of July, 2024.</p> <p style="text-align: center;"> _____ Court Reporter</p> <p>Notary Registration Number: 8080206 My Commission Expires: May 31, 2027</p>

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