CL23001513-00
DECL
OL

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF ARLINGTON

MARCIA L. NORDGREN, *et al.*	)	
	)	
Plaintiffs,	)	
v.	)	Case No.: CL23001513
	)	
COUNTY BOARD OF ARLINGTON	)	
	)	
Defendants.	)	

Written Ruling

In support of its ruling read into the record on September 27, 2024, the court submits this Written Ruling

Background:

This matter started with the enactment by the Board on March 22, 2023, of a change to Arlington's zoning ordinance. This change allowed builders to tear down single-family homes in single family neighborhoods and replace them by right with up to six-unit buildings known as multiplexes. This was termed Missing Middle Housing which was later renamed Expanded Housing Option Development (EHO). The number of EHO multiplexes allowed under this amendment was limited to 58 a year for five years and unlimited thereafter. This would allow in one year the building of up to several hundred additional residences. Since the ability to build multiplexes on single family home lots was by right, the builder had no obligation to consider the impact of the multiplex upon the neighborhood character, the local schools, traffic congestion, stormwater drainage, or sewer capacity.

The plaintiffs argue that the broad nature of the zoning amendment by right had the potential to eliminate or substantially reduce single family home ownership in traditional neighborhoods that have existed for decades. The plaintiffs argue that the homeowners that purchased their homes years ago in order to live in a particular neighborhood

surrounded by single family homes are now faced with the possibility of a six Plex behind them, on both sides of them, and across the street from them. In other words, their quiet suburban neighborhood could be transformed into a mishmash of townhouses and condominiums. This would result in the destruction of the character of their neighborhood. These homeowners argue that they have been paying taxes and contributing in other ways to the community for decades.

They argue that many of the homeowners who testified at the trial were not wealthy, but they had purchased their home long ago and it had gone up substantially in value as a result of them paying the mortgage, taxes and insurance on their home for decades.

All the witnesses agreed that the goal of more affordable housing in order to facilitate a more diverse population and provide more affordable housing is laudable. The method of achieving that goal is where the dispute arises.

In order to successfully implement this policy, the County must follow the specific statutes in the Code of Virginia. These statutes contain procedural and substantive requirements that must be complied with for a zoning ordinance to be enforceable.

This is particularly true for an amendment of this scope and impact. A zoning amendment that could essentially restructure the entire county and severely impact the rights of its citizens must be scrutinized carefully to ensure that the protections built into the Code of Virginia are respected and satisfied. The appellate courts of Virginia have on numerous occasions and recently in Fairfax County and Arlington County invalidated zoning ordinances on procedural grounds. To some, the insistence upon procedural correctness may seem like nitpicking or unimportant. The appellate courts of Virginia insist upon strict compliance with all procedural requirements in the code. This court must take notice of these decisions by the appellate courts.

The procedural requirements of the code are there to provide adequate notice and protection to its citizens when a local governing body determines to change zoning. The legislature would not have provided these procedural requirements unless they considered the requirements to be necessary for the protection of all citizens regarding zoning modification. It is impossible for this court to ignore or wink at procedural defects. Past practices if in violation of the procedural requirements of the Code of Virginia do not excuse violations in the present.

To the credit of the County Board, several days of public hearings were held in which citizens were able to express their views for and against the passing of the EHO. It was clear from the statements of citizens at these hearings that there was substantial disagreement among the populace as to the propriety of passing the EHO. In addition, substantial written materials were made available to the public for the purpose of educating the public on the purpose and scope of the EHO. These written materials were of high quality and very sophisticated. There is no doubt that many individuals worked very diligently and very long

hours in support of the EHO and they believe in its purpose and practicality. The staff provided high quality written materials to the Board. Ultimately the County Board of Arlington bears the responsibility of ensuring that any zoning amendment is procedurally correct and that the Code of Virginia is followed to the letter. Also, the County Board is the sole decider of whether the EHO is good policy. The elected representatives are the proper people to decide if EHO is good policy. Whether EHO is a good or bad policy is beyond the bailiwick of the Court. The Court should not determine if EHO is a good or bad policy. Rather the Court is limited to determining whether the requirements of the Code of Virginia have been met.

Standing:

Before we examine the evidentiary findings of the Court, we must address the issue of standing. I have ruled upon the issue several times and explained why I believe the plaintiffs have standing. I will do so again.

In order for a plaintiff to have standing the plaintiff must be aggrieved. That is, the plaintiffs must have a direct interest in the subject matter of the suit. The plaintiff must bring a suit in which his or her rights will be affected by the disposition of the case. A ruling regarding standing does not concern itself with the merits of the case but rather with the characteristics of the plaintiffs bringing the case. If the court determines that a plaintiff does not have standing to bring the suit, then the case must be dismissed. On the other hand, if the court finds that the plaintiffs have standing to bring the suit, then the case will proceed to trial unless dismissed on other grounds.

For the purpose of this ruling, the following facts are established.

All nine of the plaintiffs are homeowners in Arlington County either individually or by family trust. All of their homes are in zoning districts modified by the actions of the Expanded Housing Option Development.

Several appellate cases have been submitted for the court's consideration. The first, *Friends of the Rappahannock v. Caroline County Bd of Supervisors,* 286 Va. 38 (2013), denied standing to landowners adjacent to land which received a permit for mining operations. The second, *Anders Larsen Trust v. Bd. of Sup'rs of Fairfax Cnty.*, 301 Va. 116, (2022), granted standing to landowners adjacent to a special use proposed treatment center. The third, *Morgan v. Bd. of Supervisors*, 302 Va. 46 (2023), granted standing to landowners adjacent to a rezoned proposed distribution center and warehouse.

All three of these cases address and consider the two-step test stated in Friends.

I quote:

> "First, the complainant must own or occupy real property within or close proximity to the property that is the subject of the land use determination. Second, the

> complainant must allege facts demonstrating a particularized harm to some personal or property right, legal or equitable, or imposition of a burden or obligation upon the petitioner different from that suffered by the public generally."

None of the three cases submitted consider the standing of a property owner whose property is rezoned. These three cases involve the rezoning of property not owned by the plaintiffs. Therefore, they are distinguishable from the case before the court. No case has been submitted that applies the two-step test of Friends to a property owner in the position of the plaintiffs in this case. In fact, the Friends case contains language that makes it clear that the two-prong test is not applicable to a case in which the plaintiff has an ownership interest in their property that has been rezoned.

> **"Unlike a challenge to a land use decision by a party claiming an ownership interest in the subject property where the affected property right is readily apparent,** a party who claims no ownership interest in the subject property must satisfy a two-step test to have standing." (Emphasis added)
>
> "We employ a two-prong test to determine whether a person who does not have an ownership interest in the subject property has standing to challenge a zoning determination."

These quotes imply that an owner with an ownership interest in rezoned property has standing.

While these quotes do not specifically state that the plaintiffs having an ownership interest in rezoned property provide standing, the implication that the property owner of rezoned property has standing cannot be ignored from a fair reading of these two quotations.

This conclusion is supported by the Virginia Supreme Court case of *Cupp v. Bd. of Supervisors*, 227 Va. 580 (1984).

The Cupp case held that a business owner who owned their property had a direct stake in the zoning ordinance curtailing or controlling their business on their property.

We are left with the situation that we have no Virginia Supreme Court case directly on point to the fact pattern we have before us. That is, we have no case in which a property owner whose property is rezoned is challenging the rezoning of an adjacent lot that is rezoned in addition to their lot.

It would seem appropriate to use the general requirements of standing to determine if the plaintiffs in this case have the appropriate standing to bring suit. The first question is whether the plaintiffs are aggrieved. Do they have a direct interest in the subject matter of the suit? Will their rights be affected by the decision in this case? In the Court's view, any decision in this case will directly affect the plaintiffs. Any decision in this case will certainly affect the property of the plaintiffs. Either the property will remain zoned under the

expanded housing option development or revert to the original zoning prior to the enactment of EHO. When the plaintiff's property was rezoned the nature of their ownership interest was changed. The property that they owned was now different than before. It is difficult to understand how a property owner whose property has been rezoned would somehow not have the standing to object to the rezoning of their property. This would seem to be a fundamental right of a plaintiff to challenge a rezoning of their property that they allege was done incorrectly or in violation of the Code of Virginia. The Cupp case supports this view.

Accordingly, I find that the plaintiffs have standing to bring this action by virtue of their ownership of property rezoned pursuant to the Expanded Housing Option Development.

The court previously held that the case of Morgan v. Board of Supervisors 302 Va. 46 (2023) (Morgan) is distinguishable from this case for the reasons stated on the record. It would still seem prudent to additionally decide the case under the alternate theory that Morgan controls the determination of standing. Therefore, under the rule in Morgan on the issue of standing this court makes the following ruling.

In order for the complainants to have standing the Morgan case found:

(1) the complainant must own or occupy real property within or in close proximity to the property that is the subject of the land use determination, thus establishing that it has a direct, immediate, pecuniary, and substantial interest in the decision; and
(2) the complainant must allege facts demonstrating a particularized harm to some personal or property right, legal or equitable, or imposition of a burden or obligation upon the petitioner different from that suffered by the public generally.

In addressing this two prong test the Supreme Court stated:

"We acknowledge that the imprecision of these factors necessarily requires an exercise in judicial line-drawing. Even so, as Justice Holmes once said, we should not be "troubled by the question where to draw the line. That is the question in pretty much everything worth arguing in the law." Irwin v. Gavit, 268 U.S. 161, 168 (1925)

Put another way, it is a matter of degree. Placement of a distribution center next to a homeowner creates standing under Morgan but the placement of a multifamily dwelling may not. The plaintiffs argue that many of the harms caused by a distribution center are also present in a multifamily dwelling. The lights at the distribution center may be brighter, the traffic greater and the flooding deeper but the plaintiffs allege that the harm exists either way.

As to prong one of the Morgan test, the plaintiffs testified at trial that their homes are in close proximity to properties for which development under EHO has begun. The testimony of several plaintiffs indicated that EHO development was as close as three blocks away, less than a mile away, or a short drive from their home. In addition, all the plaintiffs own land that is within or close proximity to the land that is the subject of the zoning determination. Their property and the property around them are all subject to the land use determination of EHO. The last portion of the first prong indicates that this establishes that they have "a direct, immediate, pecuniary, and substantial interest in the decision;"

Accordingly, the first prong of the Morgan test is satisfied.

As to prong two, the plaintiffs alleged and testified to numerous facts in support of particularized harm to each plaintiff.

In Morgan the Supreme Court found the following factors to be sufficient to satisfy the second prong of the test:

"The principal list of such harms includes claims of a dramatic increase in traffic to and from the Wegmans facility, including 860 additional tractor-trailer trucks per day traveling through their neighborhood; flooding that will affect one of the homeowner's properties and areas where their children play; chronic, excessive noise from truck back-up alarms; and the localized effect of night-sky light pollution from the taller lighting poles to be used in the facility's parking areas."

Please note the inclusion of increase in traffic, flooding, effect upon children and lighting as a particularized harm to the subject property. Plaintiffs in this case allege that the construction of a four plex or a six plex would create just such harm to their property. They allege that this harm would not be suffered by all the residents of the county but only by the plaintiffs due to their particular circumstances.

The plaintiffs also allege particularized specific harm of school overcrowding. They allege that school overcrowding is not suffered by the public generally but only by the owners with children in the overcrowded school that their children attend but not uncrowded schools.

Prong two requires that the harm imposed be particular to the homeowner different from the harm to the public generally.

At trial the witnesses testified as to the particular harm they would suffer different than suffered by the public generally.

A witness testified that the EHO amendment applied to her property but not to her neighbor's property resulting in a disparate impact.

A large number of the plaintiffs described the difficulty of increased traffic or decreased parking in their neighborhoods based upon unique natures and locations of their neighborhood. For example one witness testified she lives near a busy main road in which

people drive too fast through her neighborhood as they cut through. Another witness noted that he did not live near a bus stop so many of his neighbors own multiple cars which caused him concern about child safety and the very narrow width of his road. In fact, two cars cannot pass at the same time which is certainly not a difficulty that the public at large would suffer but is specifically his problem. Another witness noted parking issues unique to her neighborhood and another witness noted traffic congestion and parking issues created by Williamsburg Middle School. Two of the plaintiffs reside near metro stations where the EHO amendments would require fewer parking spaces for EHO development which would make parking for that witness unique and not suffered by the public at large. All of these difficulties are unique to the neighborhoods where the homeowners live. They are not problems suffered by the public at large.

Several witnesses testified that the tree canopy was a major decision causing them to purchase their home. They testified that EHO development would reduce tree coverage during construction and for the foreseeable future as trees planted need years to grow. Once again this is a harm unique to them and not suffered by the public in general, specifically those that live in the more urban areas of the county.

Several witnesses testified as to their particularized harm regarding school attendance. One plaintiff testified that she was concerned that her child who needed services would not be able to get them due to overcrowding in their particular school. She testified that her school is overcrowded now and is using trailers already.

Other witnesses testified that they've experienced overwhelmed stormwater and sewage facilities and as a result they are concerned about increased density in their local neighborhood. The plaintiff's expert Mr. Quinn supported this concern by expert testimony that the older lateral pipes would not be able to support the pressure or hydraulic head created by increased sewage from newly developed EHO units which could include up to six separate residences with six separate sets of liquid waste being pumped into a common sewer line.

These witnesses testified that because of the unique circumstances of their local neighborhoods they will suffer harm different from that of the general public. The general public will not suffer specific harm from sewage overflow, stormwater overflow, overcrowded schools, or loss of tree canopy but these are limited to specific circumstances in local neighborhoods.

The evidence of the witnesses at trial shows that many of the harms anticipated by the plaintiffs have already begun and are not merely imminent.

The recital of the testimony of witnesses above supports the argument of the plaintiffs that they can show substantial risk of future harms from the EHO ordinance.

In addition, the Supreme Court in Morgan noted:

"For standing purposes, "[a]n allegation of future injury may suffice if the threatened injury is 'certainly impending,' or there is a "'substantial risk" that the harm will occur.

In this case, the Court is of the opinion that there is "substantial risk" of harm occurring in each of the homeowners' circumstances.

A discussion of the status of the requirements for standing when challenging a zoning ordinance is appropriate at this time. Pursuant to the Code of Virginia the plaintiffs are constrained by the requirement that they must file an action within 30 days of the enactment of the zoning change. They must by necessity plead future harm as most development will not occur within 30 days. If they wait until the trees are cut and the construction begins next to their home, it is too late, 30 days will have run. They are left with no remedy. This is particularly true when the construction is "by right." If one insists upon application of the two-step test of Morgan, then by the application of existing law the homeowner whose land has been rezoned is without a remedy. As a practical matter, no construction will take place that would satisfy the two-pronged test of Morgan within the 30 days in which the plaintiffs must appeal. The plaintiffs then must rely on future harm. The claim of future harm will then be attacked as speculative under the test in the two-prong test under Morgan. The combination of a requirement to file an action within 30 days and the requirement of the two-pronged test of Morgan results in the elimination of any remedy of the homeowner upon their land being rezoned. This constitutes another reason why the two-pronged test of Morgan is not appropriate or applicable to this case.

Accordingly, the court finds the plaintiffs have satisfied the Morgan two prong test. As a result, they have standing to proceed with this matter.

Evidentiary Findings of the Court Based Upon the Evidence Presented at Trial

If your recollection of the facts differs from the court's recital of the facts in this opinion, the court's statement of the facts shall constitute its finding of fact.

Final Ruling in Nordgren v. County Board

This matter was heard over five days with at least nineteen witnesses and at least one trial deposition. The number of exhibits is in the hundreds.

Both parties submitted post-trial briefs on August 23, 2024. The plaintiff's brief was 97 pages. The defendant's brief was 86 pages. As to the issues raised in this case, the attorneys have crossed every T and dotted every I. They have raised and argued for their respective clients every relevant issue that could be considered by the court.

I have considered all the issues and points of law argued by counsel at trial and in their post-trial briefs.

I have reviewed the testimony of the witnesses, the evidence presented, the legal arguments contained in the NAACP post-trial brief, my notes and the post-trial briefs of the parties.

At the outset, I feel compelled to complement the credibility of all the witnesses. In my judgment, all the witnesses did their best to truthfully and completely answer the questions of counsel.

Two quotes from the witnesses are particularly telling.

The first quote is from a witness for the plaintiffs:

"More houses, more people, more kids."

This would seem self-evident. Put another way, more houses mean growth in the population.

The second quote is from a witness for the defendant who replied yes to the question:

"Arlington is a special place? Answer: Yes."

Arlington is located right across the river from the nation's capital with a mixture of urban and suburban living, parks, and bike trails. Tremendous opportunities exist for business, cultural, educational and recreational enrichment in Arlington.

Both statements are true.

However, the difficulty arises over how best for the county to proceed into the future. In 1972 the area known as Rosslyn contained a used car lot, several vacant dirt lots and a pawn shop. There was no subway and no high-rise apartments along Wilson Avenue. Obviously since that date this area has changed dramatically. So change, while not inevitable, does sometimes occur over time. This change can greatly modify the character and use of property within the county. The County Board of Arlington is the proper legislative body given the difficult task of guiding Arlington County to the future.

In exercising that function the County Board is required to follow the Code of Virginia. Whether the County Board followed the Code of Virginia is the question before the court in this case. The appellate cases from Virginia make clear that failure to follow the Code renders the zoning amendment void *ab initio*.

Let's turn to the merits of the case. I will rule on each count in order. The first count is:

Count I: The Board failed to promulgate an initiating resolution or motion for the Zoning Amendment in accordance with Virginia Law.

In order to resolve this Count, it is important to carefully consider the applicable code sections. The first code section that is applicable is 15.2-2286(A)(7) which provides in

pertinent part that a zoning amendment may be initiated by resolution of the governing body.

> "For the amendment of the regulations or district maps from time to time, or for their repeal, whenever the public necessity, convenience, general welfare, or good zoning practice requires, the governing body may by ordinance amend, supplement, or change the regulations, district boundaries, or classifications of property. Any such amendment may be initiated (i) by resolution of the governing body; ... however, the ordinance may provide for the consideration of proposed amendments only at specified intervals of time and may further provide that substantially the same petition will not be reconsidered within a specific period, not exceeding one year. Any such resolution or motion by such governing body or commission proposing the rezoning shall state the above public purposes therefor."

I would note that a reasonable interpretation of the code section is that the proposed amendments may only be considered at specified intervals of time after the resolution is passed. This is an implication that the resolution would come before consideration of the proposed amendment. In other words, before the governing body considers the amendment the resolution must be passed. So it would seem the resolution must be passed first before any further action is taken but there is no definition of the amount of time between the passing of the resolution and further steps required by code to pass the zoning amendment.

The resolution in question is:

> "The County Board of Arlington County hereby resolves to authorize advertisement of public hearings at the Planning Commission and County Board meetings to be held on March 6, 2023, and March 18, 2023, respectively, to consider (A) amending the General Land Use Plan, as shown in Attachment 2, to amend text in the booklet to add a new subsection under "Special Planning Areas" describing land use goals for expanding housing choice in lower density residential areas, amend text in the "Planning History and the Development of the General Land Use Plan" section, and amend the map legend for the "Low" Residential designation; and (B) amending, reenacting, and recodifying the Arlington County Zoning Ordinance, as shown in Attachment 3, relating to the establishment of expanded housing option development, including definitions and standards for uses, density and dimensions, bulk, coverage, and placement, site development, signs, parking, appeals and variances, and nonconformities, to facilitate the vision of the General Land Use Plan and Affordable Housing Master Plan; and in order to reduce or prevent congestion in the streets, facilitate the creation of a convenient, attractive and harmonious community, encourage economic development, and for other reasons required by the public necessity, convenience and general welfare, and good zoning practice."

So, a fundamental question needs to be addressed. Was a resolution initiating a zoning amendment actually passed by the Board? The code mandates a simple process. The governing body must pass a resolution providing for amendment to the zoning regulations. In addition, pursuant to code section 15.2-2204 the governing body must authorize advertisement of public hearings. In the case before us the governing body did not pass a resolution separate from the resolution to authorize advertisement of public hearings. Within the resolution to advertise there is no actual statement indicating that the county board is resolving to amend the zoning ordinance. Instead, the resolution authorizes the **advertisement** of public hearings to consider amending the general land use plan and to consider amending the Arlington County zoning ordinance. Then tacked on at the end is the phrase "and in order to reduce or prevent congestion in the streets, facilitate the creation of a convenient, attractive and harmonious community, encourage economic development and for the reasons required by the public necessity, convenience, general welfare, and good zoning practice." This tracks the language of 15.2-2286(A)(7) but in and of itself does not constitute a resolution.

Simply put, this resolution to advertise contains no statement that the County Board is resolving to amend the zoning ordinance. The resolution authorizes an advertisement of public hearings to consider the amendment of the zoning ordinance, but nowhere does it clearly state that the board resolves to amend the zoning ordinance. The language tacked on at the end does not in and of itself inform the public that the county board resolves to amend the zoning ordinance. One could argue that it is self-evident from the existing resolution that the county board intends to amend the zoning ordinance. However, the code requires more than that.

The code "requires that each time an amendment to the zoning ordinance is made, the amendment must be properly initiated." *Ace Temporaries, Inc. v. City Council of City of Alexandria,* 274 Va. 461, 467 (2007).

Accordingly, the court finds that no proper resolution was entered by the County Board as required by 15.2-2286(A)(7).

The plaintiffs argue that the Request to Advertise cannot also be an initiating resolution under 15.2-2286(A)(7) due to the fact that the resolution to amend must be an initiating resolution completed before the resolution to advertise is completed. Assuming for the sake of argument that the request to advertise is interpreted to contain a resolution to amend, the following problems arise.

The definition or ordinary meaning of initiate is "to cause or facilitate the beginning of: set going." Merriam-Webster, The American Heritage Dictionary of the English Language. "To set going by taking the first step, begin"; Garner's Modern English Usage.

"Words in a statute or ordinance are to be construed according to their ordinary meaning, given the context in which they are used." *Berry v. Bd. Of Sup'rs of Fairfax Cnty.* 302 Va. 114, 127 (2023).

The use of the term "initiate" mandates that the resolution to amend must be the first step in the process and not a middle or ending step. A resolution to advertise is a separate later act in the process. A two-step process is required, first a resolution to amend and then a resolution to advertise.

The case *of County of Fairfax versus Southern Ironworks, Inc*, 242 Virginia 435, (1991) is not helpful to the defendants' assertion that the Virginia Supreme Court has ruled that the initiating resolution may be included in a resolution to advertise. The issue in Southern Ironworks was whether the Fairfax County Board failed to state a public purpose but not the issue of whether an initiating resolution could be included in a resolution to advertise. It is therefore distinguishable from the case before the court.

The next difficulty concerns an issue of statutory interpretation. The Code of Virginia has two separate statutes that outline two separate resolutions. One resolution authorizes an amendment to the zoning ordinance and the other resolution authorizes an advertisement of public hearings to address a proposed zoning amendment. The legislature did not include both resolutions in one statute for a reason. Our testimony at trial indicated one of the reasons would be for the public to have notice of the intention of the board to modify zoning of their land. This would allow them to prepare in advance for any public hearing or to contact their elected representative to express their views on the potential zoning amendment. This would take place before substantial work has been done by the staff and the county board. To wait until the resolution to advertise to provide such public notice presents the public with a government body already invested in proceeding forward with the zoning amendment. On the other hand, early notice to the public through a resolution to amend will allow the public to let their views be known prior to momentum being developed in the local zoning authority. This is a logical interpretation of the proper way that the two statutes interact with each other to provide protection to homeowners and sufficient time to address any proposed zoning amendment. In addition, a resolution at the beginning of the zoning amendment process grants the citizens the ability to have input on the scope and purpose of the amendment rather than having to comment on an amendment already prepared and proposed. Early engagement by the public could shape the zoning amendment to reflect the needs of the community. Any other interpretation would render the initiating resolution statute superfluous.

"Every part of a statute is presumed to have some effect" and courts will resist construing a statute to render a part of it superfluous unless "absolutely necessary." *Bd. of Sup'rs of Fairfax Cnty. v. Cohn*, 296 Va. 465, 473 (2018.) Additionally, courts "'presume that the legislature chose, with care, the specific words of the statute' and that '[t]he act of

choosing carefully some words necessarily implies others are omitted with equal care.'" *Va. Elec. & Power Co. v. State Corp. Comm'n*, 300 Va. 153, 163 (2021)

"Every part of the statue is presumed to have some effect and no part will be considered meaningless unless absolutely necessary." *Hubbard v. Henrico Ltd. P'ship, 255 Va. 335, 340 (1998)*

To allow the initiating resolution to be entered simultaneously and within the resolution to advertise would render the initiating resolution statute, 15.2- 2286(A)(7), meaningless. As the cases listed above show this interpretation of the two statutes is not appropriate unless it is absolutely necessary. In the case before us, no evidence was presented that it was absolutely necessary to interpret the statutes in this fashion.

The County Board argues including both resolutions in the resolution to advertise is the way that it has been done in the past in both Arlington and Fairfax without difficulty. That may be true, but no court has sanctioned or reviewed that practice. The court is unable to ignore carefully crafted statutory language. The local jurisdiction is likewise unable to participate in a practice that violates statutory construction under the Dillon Rule.

The plaintiff's expert gave his expert opinion that the initiating resolution should be at the beginning of the process. The resolution gives notice to the community that a zoning amendment is being considered and allows early citizen feedback. This very important purpose cannot be served when the resolution is introduced at the middle or end rather than the beginning.

The issue of whether the court should defer to the County Board's interpretation of the two statutes has been raised in this case. Deferring to the County Board's interpretation of the two statutes runs contrary to the delegating power of the legislature regarding zoning. This argument generally applies to administrative interpretations in which the court may give greater weight than normal to an agency's position. What we are dealing with in this case is the delegation of legislative authority rather than administrative interpretation.

"The ability to regulate the use of land is part of the police power vested in the legislature which can, in turn, be delegated to local governing bodies ... and we have observed that an ordinance that regulates or restricts conduct with respect to property... is purely legislative." *Helmick v. Town of Warrenton*, 254 Va. 225, 229 (1997)

The power of the Board is " fixed by statute and are limited to those conferred expressly or by necessary implication." *Jennings v. Bd. of Sup'rs of Northumberland Cnty.*, 281 Va. 511, 516 (2011).

The County Board is limited in its authority by the Virginia statutes and case law listed above. The County Board cannot proceed by its own rules contrary to the clear legislative intent of 15.2-2286(A)(7) and 15.2-2204.

Accordingly, the court finds that placing an initiating resolution with a resolution to advertise or with a final resolution adopting a zoning amendment violates the clear legislative intent as to both subject statutes.

As a result, even under this strained interpretation the court finds that no proper resolution to amend was entered by the county board.

Count II: The Board failed to advertise the Zoning Amendment per Virginia Law.

The question presented by this count is whether the advertisement met the requirements of 15.2-2204. That code section defines the scope of the advertisement required to be in compliance with the Code of Virginia.

The plaintiffs allege that the descriptive summary in the advertisement was insufficient primarily because it made no express mention of options. The evidence shows that the notice of public hearings was timely published in a newspaper of general circulation, that copies of the proposed text was available to the public, that public hearings were held as noticed and that significant public comment was in fact received. The advertisement admitted into evidence contains the following pertinent statements:

"An ordinance to amend, reenact, and recodify the ACZO ... To establish regulations for expanded housing option development (EHO), which would allow for up to six dwelling units in a building, for properties zoned R-20, R-10, R-8, R-6, or R-5, including standards for applicability, uses, bulk, coverage, placement, site and lot area and width, building height, gross floor area, accessory uses, site development standards, parking, and signs, provisions to restrict the Board of Zoning appeals from granting use permits that allow modification of placement requirements, provisions for an annual limit on EHO permits, special exception standards for sites within area of one acre or greater, provisions for nonconformities for EHO development, provisions for nonconforming two-family dwellings zoned R-5 or R-6, dimensional requirements for required parking areas for one-family, two-family, and EHO development, and revisions to the definition of a duplex." Pls. Ex. 79 at 3.

This advertisement makes clear that the zoning would be modified to allow for 6 dwelling units in properties in R- 20, R-10, R-8, R-6, or R-5. The homeowners in those areas are given notice that a major change is being considered. I do understand that the language as a whole is difficult to decipher but that is due to the attempt to provide as much information as possible to the public. If less detail is provided, a claim of inadequate notice will be forthcoming.

In addition, the advertisement goes on to list some of the items that will be affected and changed by the zoning amendment. These include lot area and width, building height, gross floor area, parking restriction on granting of permits, annual limits of permits special exceptions.

In the Court's view, the advertisement provides notice to the public so that they may appear to present their views to the Board at a future time. In addition, any member of the public who wishes to delve more deeply into the potential zoning changes is directed to a site providing additional information.

Code Section 15.2-2204 clearly provides that amendments "need not be advertised in full **but may be advertised by reference."**

On the issue of options, the ability to reference the options by researching a site, does not appear to be fatal to the purpose of the advertisement which is to "Generate informed public participation by providing citizens with information about the content of the proposed amendments and the forum for debate concerning those amendments." *Glazebrook v. Bd. of Supervisors*, 266 Va. 550, 552 (2003). According to testimony at trial none of the options expanded the scope of the advertisement.

It should be noted that the descriptive summary portion of 15.2-2204(A)(7) has been removed by amendment but at the time that the EHO zoning amendments were adopted the descriptive summary portion was still in the statute.

Certainly, this is a matter of degree, at some point a description in an advertisement may be insufficient. However, other descriptions may satisfy the statute. This is a judgment call based upon the relevant code sections.

The subject advertisement in this case appears to the court to be sufficient to satisfy the statute.

Count III: The Zoning Amendment is void *ab initio* because the Board acted *ultra vires* by failing to reasonably consider many Virginia Code 15.2-2284 factors.

Count III of the declaratory judgment pleading alleges that the Board failed to consider many factors under Virginia Code section 15.2-2284. This requires the court to consider the actions of the Board regarding its relationship to the public and the reasonableness of its' consideration of the factors contained in that statute.

The statute in question is:

"Zoning ordinances and districts shall be drawn and applied with reasonable consideration for the existing use and character of property, the comprehensive plan, the suitability of property for various uses, the trends of growth or change, the current and future requirements of the community as to land for various purposes as determined by population and economic studies and other studies, the transportation requirements of the community, the requirements for airports, housing, schools, parks, playgrounds, recreation areas and other public services, the conservation of natural resources, the preservation of flood plains, the protection of life and property from impounding structure failures, the preservation of agricultural and forestal land, the conservation of properties

and their values and the encouragement of the most appropriate use of land throughout the locality." 15.2-2284

Failure to follow the appropriate statutes for zoning ordinance results in the voiding of the statute.

"Failure to abide by the statutory prescriptions for the adoption of an ordinance renders the ordinance void *ab initio*." *Town of Jonesville v. Powell Valley Village Ltd. P'ship*, 254 Va. 70, 74 (1997)

The plaintiff's expert on planning and zoning testified that the proposal was missing an analysis of impacts at the neighborhood level where the EHO development would occur. This evidence was not contradicted by the defendants' witnesses.

The chief support engineer for the county's water, sewer, streets department, testified that he evaluated the EHO development on sanitary sewers on a system wide basis but did not do so on a localized basis. No documents considering the localized impact of EHO were known by him.

The Watershed Manager in the Department of Environmental Services for the county admitted that they did not analyze whether there would be any adverse effects from EHO development at the neighborhood level.

The county only retained one outside consultant to assist them in evaluating the impact of EHO. That outside consultant will be known as the primary consultant for the purpose of this ruling. The evidence supports the view that the primary consultant for the Board regarding EHO was instructed to avoid disagreement with the staff of the county because the public "will FOIA it," Pls. Ex.98 PES Dep. 179:20-181:1. The primary consultant understood that to mean "we shouldn't be making recommendations that didn't comply with the policy decision that had been made by the County." Further inquiry resulted in the testimony that the primary consultant was "[not] to be on record making recommendations that didn't comport with the staff's judgment as to what could be approved, and what was the right thing to do, given all the concerns they had to figure in" Def. Ex. 341 July 12, 2024, PES Dep. Tr. 28: 10-14. These communications took place before the first report to the Board.

The primary consultant also testified at deposition that its principal task was to determine what developers would do under the EHO regime. The primary consultant admitted that they did not talk to a single developer" about what they would do or not do" with EHO development Pls Ex. 98 PES Dep. Tr. 109:15-110:18, 113:15-114:4 (Q. "your judgment about what developers would or would not do ... was based upon a review of past behavior that did not include EHO development, correct? A. Yes Q. Without talking to the developers? A. Correct"). Pls. Ex 98 PES Dep. Tr. 137:7-16, 143:10.

In addition, the county staff was informed by a third party that the primary consultant had determined that EHO development would be dispersed across the county. This was contrary to the conclusion of the primary consultant that EHO properties would not be evenly dispersed throughout the county. Their analysis was that EHO development would occur in " more affluent neighborhoods that had higher — higher value properties that could support higher prices and higher rents, yeah, which would suggest near-- metro," Pls. Ex. 98 PES Tr. 128:16-129:5

None of the above inconsistencies were brought to the attention of the public at any of the public hearings.

As to the schools, the principal planner for Arlington County Public Schools testified that he did not use normal operating procedures to assess localized impacts to schools under EHO. He was asked to evaluate the impact of the EHO amendment on the public school system as a whole by assuming that the EHO development would be dispersed throughout the county and not concentrated in one part. He was also directed to assume that only 19 to 20 lots would be converted to EHO each year. When the principal planner performed this analysis under those conditions, he calculated that 80 to 94 students would be added each year due to EHO construction. The principal planner testified that these numbers on his spreadsheet were changed by his superior when he was out of the office to reflect nine students per year rather than 80 on the low end and 13 rather than 94 on the high end. No explanation was given to him why the numbers were reduced. The principal planner stated that the impact of EHO development potentially is minimized by assuming dispersal throughout the County.

This inconsistency was not brought to the attention of the public at any public hearing.

Staff identified serious concerns with stormwater conveyance if EHO was implemented. These concerns were brought to the attention of their superiors. The lead staff member on stormwater infrastructure sent an e-mail to the Department of Environmental services (DES) as follows:

"I cannot state in strong enough words that this is going to be devastating to the already stressed storm water conveyance system. The issue is not just what will happen in flood inundation zones, but that the areas that drain to these zones also contribute to the flow of stormwater into the inundation zones. Areas that are not problematic now will become problematic because the available land for overland relief shrinks, there are no protections for setback from existing storm water drainage pipe networks, and problems with lot to lot grading/drainage will be harder to address and will be magnified." Pls. Ex. 136 at ArCo-11503.

This staff member continued to the difficulties of making EHO by right:

"It is my opinion that the problem with the current proposal is that it expands by right zoning without and before any requirement is made to analyze and address adverse stormwater impacts. By not including any requirement to address adverse stormwater impacts it will be impossible to try to do so later – we will be told "but it is by-right, you cannot impose any requirements". So the requirement to assess and address adverse stormwater impacts should be along with or before MM becomes by right. Not every location will have or cause adverse impacts, but in some locations, it will be severely adverse. Those need to be addressed before MM becomes by right." Pls. Ex 137 at ArCo_11066.

Another staff member addressed the problem in this fashion:

"we are of course struggling with a stormwater system that is so inadequate on every conceivable level ... the system we have, which is so compromised it lacks elasticity we want to have to absorb these kinds of changes" Pls. Ex. 153

These concerns were dismissed or not considered on the basis that if you are building on the same footprint of a single-family home with a six plex there will be no deleterious effect or increase in storm water drainage requirements. This position appears to be supported by no study or evaluation.

These concerns of staff were not brought to the attention of the public in any meeting.

Ben Quinn, a mechanical engineer and plaintiffs' expert as to sanitary sewage systems explained that some home laterals may not connect or flow sufficiently to stop a backup even though the main sewer line may continue to function.

He stated: "in the best cases, your sewage, your effluent will just back up and it will not drain. In the worst case where there's a significant hydraulic head, you could potentially get your upstream neighbor's sewage in your lowest-lying device, if you will. So, yeah, it's raw sewage coming into your residence, and I've dealt with that in the past in Arlington."

He also stated that he considered locational and neighborhood impact analyses to be benchmark practice for zoning amendments that increase density.

The burden is on the plaintiffs to show that the Board failed the fairly debatable test. In other words, the Board only needs to show some evidence of reasonableness in its decision to defeat this count. The difficulty for the Board in this case is the lack of any consideration of the effect of additional sewer water and stormwater on the local laterals from single family homes along the length of the sewer system. Laterals are defined as the pipes from the homeowner's home to the county sewer system. It appears from the evidence that no consideration was given to the effect of additional influx of sewage from additional units built on the lot where a single-family dwelling once stood. There is no

evidence that the Board considered that a six plex with at least six toilets, additional washing machines, showers, sinks and dishwashers would increase the flow in the county system so that homeowners sharing the sewer line with that six plex will suffer sewage backup into their homes. No study was brought forward that looked at the effect of this additional flow on the laterals coming from single family homes on the sewer system.

The expert for the plaintiffs testified that flooding of individual homes was likely even when the sewer system could operate successfully with a greater flow. The expert emphasized that an examination of the laterals should have been required before a multiplex would be allowed to replace a single family home. No evidence was presented that this potential and likely intrusive sewer overflow was considered. There was some testimony that the builders would be required to deposit a few hundred dollars to the county for maintenance if required by the construction of the new multiplex.

Other than that, there appears to be no consideration of the damage or inconvenience that would be caused by a sewer overflow into a homeowner's home caused by the construction of a multiplex along the common sewer line.

Therefore, the court finds that the Board failed to consider the localized impact of EHO development upon the neighborhoods where EHO housing will be built. This failure to consider the localized impact violates 15.2-2284, specifically but not limited to. the requirement for the Board to consider "the existing use and character of property, the suitability of property for various uses, and the trends of growth or change."

Count IV: The Board unlawfully delegated legislative authority in granting a special exception for EHO Development.

In order to resolve this Count, it is important to carefully consider the applicable Code sections of the Code of Virginia. The Code sections implicated by this Count are 15.2-2286(A)(1) and (3); 15.2-2201, and 15.2-2288.1. The first question is just what is a "special exception." The simplest and easiest answer is that a special exception is as defined in 15.2-2286(A)(1). That code section defines a special exception as "a special use that is not permitted in a particular district except by a special use permit granted under the provisions of this chapter and any zoning ordinances adopted herewith." A special exception is a modification or exception "to the general regulations in the district." 15.2-2286(A)(7).

In the case before us, it is uncontradicted that a permit is required in order to build an EHO housing unit on a single-family zoned lot. The evidence makes clear that no one can build such an EHO housing unit without a permit. The zoning is single-family homes on the appropriate lots. So, the construction of EHO housing is a change in the general regulations of the zoning district.15.2-2286(A)(1).

"The decision to grant or deny a special use permit is a legislative, not an administrative function." *Rinker v. City of Fairfax*, 238 Va. 24, 30 (1989).

As a result, special exceptions may only be granted through legislative action" under suitable regulations and safeguard." *Bd. of Sup'rs of Fairfax Cnty. v. Southland Corp.*, 224 Va. 514, 522 (1982).

The issuance of these permits has been delegated to staff and not to an appropriate entity for legislative scrutiny. This removes the special exception procedure which would require a public process with localized studies, public participation, and consideration of the protection of neighboring residents from the excepted use.

Such an assignment of legislative scrutiny is not allowed or authorized under Virginia case law. Accordingly, the Court rules that the Board improperly delegated legislative authority without suitable regulations and safeguards under 15.2-2286.

Count V: The Zoning Amendment is arbitrary and capricious and bears no reasonable relationship to public health, safety, morals, or general welfare.

This is quite broad and general. Based on the evidence in this case the court is of the opinion that the plaintiffs have failed to show that the actions of the Board were arbitrary and capricious in such a broad fashion. This count is a bridge too far. This is a step beyond failing to reasonably consider specific provisions of 15.2-2284 as addressed in Count III.

Count VI was previously dismissed by the Court after a trial.

Count VII: The landscaping provision of the Zoning Amendment renders the Zoning Amendment void *ab initio* because the Board acted *ultra vires* by acting contrary to Virginia Code 15.2-961.

The allegation of the plaintiffs as to this count raises the classic clash of a violation of a state statute by a local ordinance in violation of the Dillon rule. The Dillon rule requires that the municipality must act within the powers expressly or impliedly conferred upon it by the General Assembly.

If a municipality deviates from the legislature's express delegation of power, its action is void. *Sinclair v. New Cingular Wireless PCS, LLC*, 283 Va. 567, 576 (2012).

Under the provisions of 15.2-961(A), Arlington County "may adopt an ordinance providing for the planting and replacement of trees during the development process pursuant to the provisions of this section." In addition, "[i]n no event shall any local tree replacement or planting ordinance adopted pursuant to this section exceed the requirements set forth herein." Va. Code § 15.2-961(J).

Arlington County complies with the Chesapeake Bay Preservation Ordinance (CBPO) in Arlington County Code section 61-10(C). The Board's designee, testified by deposition read

at trial that any builder under the EHO provisions "would have to meet [the CBPO], and it would have a shade tree requirement under the zoning ordinance, and it would have to meet those requirements independent of each other."

"To support a greater number of trees retained or planted than the minimum 10% or 15% CBPO requirement, the advertised ACZO amendment includes requirements for shade tree planning or retention for EHO development." Pls. Ex. 82 at ArCo_03553-03554 Staff Report

Specifically, a witness wrote: "the builder will have to meet both the Chesapeake Bay Preservation Ordinance (CBPO) tree canopy coverage standard (set by state code) and the proposed tree planting standard of the zoning ordinance." Pls. Ex. 200. In addition, they added, "in most cases the one tree per unit zoning requirement would result in more shade trees than relying solely on the 10% or 15% CBPO standard." Pls. Ex. 200

Evidence presented by plaintiffs in exhibits show that the public was told that the EHO would in fact increase the tree canopy above the CBPO requirement.

The Court Is not persuaded by the argument that the shade tree and the tree canopy are two separate items that do not interact and can exist next to each other.

Accordingly, the provisions of the EHO regarding tree canopy are directly contrary to requirements of 15.2-961 and in fact exceed the requirements of 15.2-961.

CONCLUSION:

After careful consideration, and for the reasons contained herein, the Court makes the following findings:

Count I: The Board failed to pass an initiating resolution or motion for the Zoning Amendment in accordance with Virginia Law.

Count II: The Board advertised the Zoning Amendment in accordance with Virginia Law.

Count III: The Board failed to reasonably consider several required factors in Virginia Code 15.2-2284.

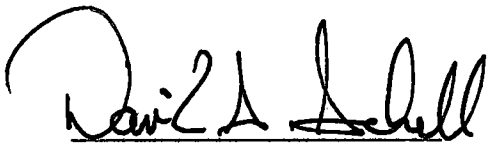
Count IV: The Board unlawfully delegated legislative authority in granting a special exception for EHO Development.

Count V: The Zoning Amendment is not arbitrary and capricious.

Count VI was previously dismissed by the Court after a trial.

Count VII: The landscaping provision of the Zoning Amendment contains provisions contrary to Virginia Code 15.2-961.

ENTERED THIS 25TH DAY OF OCTOBER, 2024.



David S. Schell
Judge Designate