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February 6, 2021

The Honorable Timothy J. Sargeant
Commissioner at Large
Fairfax County Planning Commission
12000 Government Center Parkway, Suite 552
Fairfax, VA 22035
plancom@fairfaxcounty.gov

Re: ZMOD [February 10 vote]

Dear Commissioner Sargeant,

I have reviewed selected portions of the January 19, 2021 revised draft of the ZMOD ordinance. I write again to offer a few suggestions and propose corrections. I write as an individual, not on behalf of any group, but as someone who is somewhat familiar with the ordinance provisions concerning the Board of Zoning Appeals (BZA). I understand the magnitude of staff's difficulty with this colossal drafting project, further constrained by the pressure of arbitrary deadlines. I also understand you will be making the motion.

Citizens expect Fairfax County's zoning ordinance to reflect painstaking excellence in drafting. Patient proofreading, and accurate cross-checking of statutory references, are essential steps to reach that goal. If ZMOD is going forward on Wednesday, unfortunately there remains little opportunity for a more careful review of the entire revised text, to get your recommendation done "right" rather than merely "fast." In the interest of emergency room triage, I therefore focus primarily on a few pages towards the end. In the rush to publish an updated working draft for the Commission before the public hearing, unfortunately there may not have been sufficient time for staff and the Clarion Consultants team to proofread the entire text carefully, particularly less controversial but nevertheless important sections. I hope these comments are still welcome, and that there remains time to incorporate these and other corrections before your vote.

BZA typographical/grammatical errors

I had understood that Clarion and staff intended to carry forward the existing ordinance provisions, regarding the BZA, without substantive change, although some editing is apparent. Yet some mistakes appear to have been inadvertently made in the published text. I recognize also that the Clarion team's focus may have been on other more controversial matters, with little attention to the details of the BZA.

Page 602, Sections 3A and 3B, the statutory references have been changed. In the current ordinance, the references are to Article 7, Chapter 22, Title 15.2 generally. In the new version,

the text refers only to § 15.2-2303, which appears to be the wrong statute, in both instances, dealing instead with establishment of an ordinance for conditional zoning with proffers. Section 15.2-2303 is very specific, and while authorizing an ordinance, makes no mention of the duties of the BZA (Section 3A; cf. § 15.2-2309) or its establishment (Section 3B; cf. § 15.2-2308). The new ordinance text likewise does not incorporate the important statutes following § 15.2-2303, through the usual drafting convention of “et seq.”

If “modernization” compels limiting citations in the new ordinance to a specific Virginia statute or statutes, rather than simply carrying forward the current references to the entire chapter, the correct references to the BZA in the state code actually are found in § 15.2-2308, dealing with the creation of the local BZA; § 15.2-2308.1, dealing with staff, staff reports and ex parte communications; § 15.2-2309, dealing with the powers and duties of the BZA; § 15.2-2310, dealing with special exceptions and variances; § 15.2-2311, appeals to the BZA; and § 15.2-2312, procedures on appeal. Other code sections in Title 15.2 also refer to the BZA, but are less directly pertinent to the local ordinance. If there is a need to call out specific statutes in Sections 3A and 3B, rather than carrying forward the existing reference to Title 15.2 generally, some combination of the six state code sections listed above would seem more accurate than § 15.2-2303.

I would suggest first: there is no need to modify and/or narrow the state code references in the current ordinance; and second: from a legislative drafting perspective, retaining the more general reference to Title 15.2 from the existing zoning ordinance may be preferable to calling out only § 15.2-2303, and omitting the more pertinent statutes. We have not had a problem with the current ordinance’s reference to Title 15.2. The General Assembly also may amend anything in Title 15.2 at any time, add and delete requirements, including § 15.2-2303. Our local ordinance should conform to whatever the legislature, in its wisdom, may require, without having to amend the local ordinance. A more general incorporation to Title 15.2, as in the current ordinance, maintains that flexibility and harmony.

Page 602, Section C (3), the word “*are*” is missing in the first line, i.e. “such special permits as *are* authorized” from the previous iteration.

Page 604, Section F (3), the awkward term “*Chairperson*” appears, and is inconsistent with the earlier reference to “*Chairman*” on page 603, line 25, and the consistent references in the current ordinance to the “*Chairman*,” in 19-204 and 19-205, subsection 2. The term “*Chairman*” is the word the General Assembly specifies in § 15.2-2308 (A) (“*chairman*”), in § 15.2-2309, subsection 8 (both “*chairman*” and “*vice-chairman*”) and again in § 15.2-2312 (“*chairman*”). (Perhaps “*Chairperson*” is an inadvertent “modernization,” copied in error from a Clarion project in another jurisdiction.)

In any event, whatever the presiding officer of the BZA is labeled, the language should be internally consistent within the ordinance, and also consistent with the terminology in the state code. [If and when Title 15.2 of the state code is “modernized,” possibly the General Assembly may debate the virtues of “*chairperson*” vs. “*chair*” or “*chairman*” or some other term, for both local BZAs and planning commissions.] For what it may be worth, the parallel section for the Planning Commission, in the January 21 draft revisions, also appears to have a “*Chairman*,” rather than a “*Chairperson*.”

Page 604, Section G (1), first line, “*will*” should be “*must*,” to be consistent with the other editorial changes, and to clarify that the obligation is mandatory. The Virginia Supreme Court encourages the use of “*must*” in legislative drafting, rather than less imperative terms. “*Must*” has appeared extensively throughout successive ZMOD drafts.

Page 605, Section J, the new second sentence, somewhat redrafted, has a grammatical error. The subject and verb do not agree. An “*action*” “*is*” deemed . . . and “*actions*” “*are*” deemed. That conflict should be corrected, one way or the other.

Enforcement typographical errors/corrections

Pages 619-20, Section C(3), footnote 1486, the statutory reference to “15.3-2311” is in error. No such statute exists. Possibly the intent was to reference § 15.2-2311?

Incentivizing careful proofreading

I hope there remains time for a careful proofreading of this enormous document, by more sets of patient eyes. Maybe some of your colleagues could at least closely review the pages dealing with the Planning Commission, which are of great importance to your work, and which may have similar mistakes. [In view of all the money spent to date on Clarion Consulting, perhaps it would be possible for Fairfax County to offer a small reward to the public to spot other errors in the document, to incentivize that proofreading.] Other citizens might identify similar “Clarion punch list” items on other pages of interest, even if not objecting to more controversial policy changes. Fairfax County might not achieve perfection, but still might accomplish a more careful vetting of this mammoth draft before any votes. Taking the time to proofread the ZMOD text now, and get it “right,” may avoid unnecessary embarrassment and future amendment.

Timothy J. Sargeant, Commissioner at Large
February 6, 2021
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Again, I thank you and your colleagues for your careful attention to this important document, and your continued service to Fairfax County.

Very truly yours,

James R. Hart

James R. Hart

cc: ClerktotheBOS@fairfaxcounty.gov