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January 27, 2021

**By Email (plancom@fairfaxcounty.gov)**

The Honorable Peter F. Murphy, Jr.  
Chairman, Fairfax County Planning Commission  
12000 Government Center Parkway, Suite 552  
Fairfax, VA 22035

**Re: Z-Mod (January 28, 2021 Public Hearing)**

Dear Chairman Murphy:

I am a land use attorney. However, I am writing to you in my individual capacity as a Fairfax County resident and property owner. For the reasons set forth below, I oppose consideration and adoption of the proposed new Fairfax County Zoning Ordinance (Z-Mod), which I believe is beyond the power granted to Fairfax County by Virginia law, under the current pandemic, to proceed by an electronic quorum. I also oppose grant of that part of the Z-Mod proposal that would create a by-right entitlement for detached single family homes to have an Accessory Living Unit (ALU).

**Fairfax County Does Not Have the Authority to Adopt Z-Mod**

Fairfax County lacks the authority to adopt Z-Mod during the pandemic because neither the Planning Commission nor the Board of Supervisors may meet by electronic means for the purpose of adopting the new Zoning Ordinance (Z-Mod).

Section 2.2-2707(B) Va. Code requires all meetings of public bodies to take place in person, except where meeting by electronic means is permitted by Va. Code § 2.2-3708.2.

In Attorney General Opinion 20-011, issued on March 20, 2020, the Attorney General instructed that, given the nature of the pandemic, and the Governor's declaration of a state of emergency, meetings of public bodies could be held by electronic means (per the requirements of Section 2.2-3708.2) so long as the purpose of the meeting "is to address the emergency." The Attorney General Opinion further instructed that, during the pandemic, **public bodies should do by electronic means only that which is "truly essential and should defer any and**

**all decisions that can be deferred until it is once again possible to meet in person.**” (Emphasis added).

Based on that Attorney General Opinion, as well as the cited Virginia Code section, I submitted written testimony to the Board of Supervisors opposing the Board’s adoption of its Emergency Ordinance that purported to give the Board virtually unfettered power to act by electronic meetings throughout the pandemic. I believed then, and continue to believe now, that the Board’s action violated the Dillon Rule because it extended well beyond the authority granted to the Board under Virginia law.

The additional authority granted to the Board (and other public bodies) by the Governor’s amendments to Virginia’s 2020 Budget (HB29, Governor’s Amendment No. 28) and 2021 Budget (HB30, Governor’s Amendment No. 137) does not provide either the Planning Commission or the Board of Supervisors with the necessary authority to discuss and approve Z-Mod in the absence of the necessary in-person quorum.

Those amendments, which are identical, state as follows:

“Notwithstanding any other provision of law, any public body, including any state, local, regional, or regulatory body, or a governing board as defined in § 54.1-2345 of the Code of Virginia may meet by electronic communication means without a quorum of the public body or any member of the governing board physically assembled at one location when the Governor has declared a state of emergency in accordance with § 44-146.17, provided that (i) the nature of the declared emergency makes it impracticable or unsafe for the public body or governing board to assemble in a single location; (ii) **the purpose of meeting is to discuss or transact the business statutorily required or necessary to continue operation of the public body or common interest community association as defined in § 54.1-2345 of the Code of Virginia and the discharge of its lawful purposes, duties and responsibilities . . .**” (Emphasis added).

In the case of Z-Mod, there is nothing in Virginia law that **requires** the adoption of a new zoning ordinance, and adoption is not necessary for the continued operation

of the Board of Supervisors or of the Planning Commission – because, among other things, Fairfax County already has an existing Zoning Ordinance.

For these reasons, I believe that consideration and adoption of the proposed new Zoning Ordinance by the Planning Commission and/or the Board of Supervisors would exceed the authority granted under Section 2.2-3708.2 Va. Code and the Governor’s Amendments to the Virginia Budget. Accordingly, adoption of the proposed new Zoning Ordinance, otherwise known as Z-Mod, would violate the Dillon Rule and be void *ab initio*, *i.e.*, void from the beginning.

**Establishment of a “By-right” ALU Would Constitute a *Sub Rosa* Rezoning and an Amendment of the Comprehensive Plan**

If the Planning Commission decides to proceed forward in its consideration of the Z-Mod proposal (which, as noted above, I do not believe it has the authority to do) I join in the comments of James Hart (submitted on January 26, 2021) and in his request that the proposals concerning home businesses and Accessory Living Units (ALUs), be excised from Z-Mod, and separately considered. In addition, I offer the following observations and objections.

The proposal to allow ALUs in detached single family homes, subject to an administrative permit and without a public hearing, effectively converts ALUs to a “by-right” entitlement on the part of the owners of existing single family detached homes.

As such, a single-family home no longer would be a single dwelling unit. Rather, it would become a multiple dwelling unit occupied by a single family or owner, in addition to one or more unrelated occupants of the ALU.

Thus, an R-1 residential district would effectively be converted to an R-2 district, with one single family detached home with an internal ALU permitted there and providing a total of two dwelling units.

An R-2 district would be converted to an R-4 district (with four dwelling units), an R-3 district to an R-6 district (with six dwelling units), an R-4 district converted to an R-8 district (with eight dwelling units), etc.

In so doing, adoption of Z-Mod in its current formulation also would constitute an amendment of the Comprehensive Plan, which speaks in terms of dwelling units per acre. Permissible and planned densities in established neighborhoods would be significantly increased, with adverse consequences for neighborhood parking and traffic, among other things, and an increased demand for government services such as schools.

But there is nothing in the advertisement of the Z-Mod proposal which gives notice that, in this proceeding, it would effectively amend the Comprehensive Plan or that it would constitute a county-wide rezoning. As such, the public notice of the Z-Mod proposal is critically defective.

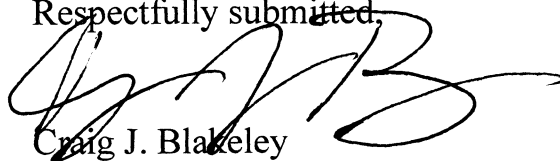
### **CONCLUSION**

For the reasons stated above, the Planning Commission and the Board of Supervisors lack the necessary authority under Virginia law to consider and adopt the proposed new Zoning Ordinance (Z-Mod) in the absence of an in-person quorum.

If the PC and the Board nevertheless proceed forward to consider Z-Mod, I join with James Hart in asking that the home business and ALU portions of the proposal be excised from the main body of the Z-Mod proposal and separately considered.

Finally, I object to adoption of the ALU proposal, as currently constituted. By conferring upon owners of single-family detached homes a by-right entitlement to an internal ALU, adoption of Z-Mod would constitute a county-wide rezoning and an amendment to the Comprehensive Plan, without having given adequate public notice of this effect.

Respectfully submitted,



Craig J. Blakeley