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January 26, 2021

The Honorable Peter F. Murphy, Jr.
Chairman, Fairfax County Planning Commission
12000 Government Center Parkway, Suite 552
Fairfax, VA 22035
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Re: ZMOD [January 28 public hearing]

Dear Chairman Murphy,

I write, as an individual, regarding the Zoning Ordinance Modernization Project (ZMOD). After decades working locally in the public and private sectors, I have come to appreciate how much the zoning ordinance affects our quality of life, neighborhood character and the environment. I personally support the resolution of the Virginia Run Community Association, where I reside, and the similar resolution from our neighbors in Fairfax National Estates, and the resolution of the Sully District Council and West Fairfax County Citizens Association (WFCCA) joint land use committee. I want to amplify selected points, and also to correct some unfortunate misinformation recently promulgated. I hope that the perspective of a former commissioner, who has worked extensively with the zoning ordinance for nearly 40 years, and has reviewed hundreds of accessory dwelling unit and zoning enforcement cases on a weekly basis for over 20 years, might add independent clarity to the Commission's vetting of the complex ZMOD package.

Bundling together 2 unrelated projects

The principal miscalculation with the ZMOD proposal was the decision to bundle together two complicated and unrelated projects: first, a do-over of the entire zoning ordinance, and second, incorporation of a controversial social justice/social engineering shift in housing policy. An ordinance update may be overdue, and "too big to fail," but the social engineering aspects, intensifying residential neighborhoods without mitigation of direct impacts, lack a consensus from the community, and the magnitude of policy changes has not been justified. Nor does this zoning update discussion objectively rise to the level of an emergency, especially during the Covid-19 pandemic, with remote meetings and awkward telephone testimony, when citizens and groups are much less able to participate fully in a meaningful discussion. I also suggest the "social engineering" proposals for accessory apartments and home businesses should be severed from the more content-neutral ordinance update, and vetted separately, if necessary.

Trendy social engineering

Recent legislative initiatives from California have captured the imagination of some

planners, and spread to other states. These proposals arise from a reevaluation of residential zoning regulations, seeking to eliminate the perceived housing crisis through social engineering. In a nutshell, under this philosophy, single-family zoning is a social evil to be reformed. Single-family zoning creates pockets of poverty. Single-family zoning concentrates crime in nonexclusive areas. Single-family zoning causes gross disparity in school performance. Single-family zoning is exclusionary and discriminatory, and exacerbates societal ills. Instead, we need to require "housing equity," to be achieved through balancing density, shifting to single-family neighborhoods their fair share of the housing burden, to accommodate the "missing middle," without NIMBY obstacles or delays in development approvals.

Along these lines, California's controversial SB50 would have authorized additional dwelling units on many single-family lots statewide. That bill failed in the California Senate https://www.usatoday.com/story/news/politics/2020/01/30/californias-controversial-housing-bill-sb-50-fails/4614387002/ , but the legislative trend has continued elsewhere. HB 151 https://lis.virginia.gov/cgi-bin/legp604.exe?201+sum+HB151 (accessory apartments by right) and HB 152 https://lis.virginia.gov/cgi-bin/legp604.exe?201+sum+HB152 (duplexes by right) both failed to get out of committee in the Virginia General Assembly in 2020. But the suggestion to abolish public hearings, first mentioned in 2016 in the pro-developer Gartner Report https://www.fairfaxcounty.gov/landdevelopment/sites/landdevelopment/files/assets/documents/pdf/nvbia/fairfax-vision-and-recommendations.pdf , has reappeared in ZMOD, which would allow market rate accessory apartments in every single-family house, by administrative approval; basically an applicant simply fills out a form at the counter and pays a fee. No notice to the neighbors, no public hearing, no development conditions, no mitigation of site specific impacts.

Abolition of public hearings for accessory apartments

I oppose abolishing the public hearing process for accessory apartments. Many Fairfax County residents already feel excluded, and that their concerns about development impacts are belittled or ignored. Abolishing important public hearings about neighborhood uses makes that tense situation even worse. While the controversial Gartner Report in 2016 recommended streamlining development approvals, including abolition of public hearings, and shifting uses to either administrative approval or by-right, Chairman Bulova's Community Council on Citizen Engagement, chaired by Walter Alcorn, instead in 2017 made recommendations https://www.fairfaxcounty.gov/chairman/sites/chairman/files/assets/documents/pdf/finalreportcommunitycouncil.pdf.pdf to expand citizen awareness and participation in the land use process. Abolishing notice to the neighbors, and an opportunity to comment at public hearings, is exactly the opposite. Abolishing the public hearings deprives citizens of an important right, to protect their home from impacts of an adjacent use, or mitigate environmental impacts.

Our current public hearing process works well. Over 90% of the accessory apartment applications have been approved, mostly for elderly inlaws. Every approved application is subject to development conditions; many applications are improved because of staff comments or neighbor input. In general, neighbors feel better about an open process where they at least have an opportunity for an impartial audience to hear their comments, and make changes. Although most accessory apartment applications are approved, the ones that are denied, often because of parking or geometry conflicts, are much more important to consider.

Fairfax County has a wide variety of zoning districts, not easily susceptible of a simplistic one-size-fits-all approach, which might be more appropriate in a more uniform urban environment. Some Fairfax County communities are much less able to absorb potential vehicles and traffic from the second household on each lot. P districts are hopeless, largely starved for parking already, many with minimal front yards, and long private streets with no curbside parking, some with baked in parking reductions. Older R-3, R-4 and R-5 homes, particularly at the end of a court, generally have small triangular front yards with no room to add parking surface, and very little street parking available already. Parking shortages are already probably the biggest single issue affecting quality of life in some neighborhoods, before further urbanization.

P districts and smaller lot R districts also have homes close together, creating geometry conflicts. The ordinance requires that apartment entrances not be on the front of the dwelling. If the apartment entrance is on the side, it may abut the neighbor's bedroom window. The Uniform Statewide Building Code requires a stoop, and probably steps, at the apartment door, as well as an exterior light fixture. Adding a node of activity and noise, without mitigation, in a narrow slot between homes, can aggravate conflicts with neighbors, some of whom may have late night parties with music, or get up early to go to work, with lights going on and off and doors slamming.

Abolition of the current over 55/disabled criteria also causes direct and cumulative impacts on neighborhoods. Younger and healthier tenants have more cars, more late night parties, more comings and goings for employment at odd hours, more potential for conflict with neighbors. Accommodating elderly inlaws in accessory apartments has worked well, but expanding categories of potential tenants, without additional infrastructure or mitigation, without notice to neighbors or opportunity to comment, may exacerbate parking stress and congestion issues, and environmental impacts. The economic incentive for adding market rate apartments also accelerates the transition of older neighborhoods.

Unfortunately, some misinformation has been spread about the current special permit (SP) process, which I had hoped to address, from my personal perspective. Some suggest that applicant complaints about the onerous cost of complying with "all the county requirements"

justify abolishing the public hearings. I personally have heard, I believe, all those applicants' complaints first hand, for more than 20 years, as an individual member of the Board of Zoning Appeals, including probably a couple hundred accessory apartment cases. (I am unaware of what complaints may have been relayed second-hand or anecdotally to individual supervisors, and possibly misinterpreted.) While we hear occasional generalized comments about the costs of compliance with "county requirements," the big ticket items are fire code and building code issues, with costs absolutely unaffected by abolishing the public hearings. The identical complaints apply to home child care cases in R districts; the BZA has heard several hundred of those as well. In over 20 years of hearing these SP applications, I do not recall ever hearing a complaint about the public hearing process itself; the accessory dwelling unit filing fee is currently only $435.00, relatively small in the context of both construction cost and rental income.

Basement bedrooms are fire traps. Basements often have old furnaces, water heaters, and electrical panels, some of which may have makeshift or unpermitted and uninspected electrical or plumbing connections, with equipment not properly maintained. Many basements are used for storage of combustible material, including cardboard boxes, old papers, paint and turpentine, and other flammable items, and lack working smoke detectors. Many older homes in R districts have small rectangular basement windows, up near the ceiling, which do not meet current standards, and are useless to exit the room in the event of a fire, especially for children and senior citizens. Many existing basements in older homes were finished "under the radar," without trade or building permits and inspections, and may not be code compliant. Some of these code problems surface through the special permit application process. In general, a bedroom or sleeping area in a basement will require construction of what is called an "egress window" https://www.fairfaxcounty.gov/code/sites/code/files/assets/documents/pdf/emergency-egress-rescue-openings.pdf , which may be the single most expensive item, involving mobilization of multiple construction trades.

To install an "egress window," someone needs to bring in heavy equipment to excavate on the outside of the foundation, haul off and dispose of the spoils, to create space for an areaway. Landscaping may need to be removed in order to get equipment access to that location. Three retaining walls, or possibly two retaining walls and a stairway, will need to be installed. The foundation wall will need to be cut, to create a larger opening for installation of an operable window with a sill no higher than 42 or 44 inches off the floor, large enough for an adult to exit through the opening and climb out. The foundation wall is probably a bearing wall, which may require adding a lintel over the opening. Carpentry and finish work, both inside and out, will be needed around the new window, and maybe some masonry. A drain and pipe may need to be installed at the bottom of the areaway so that it does not fill up with water. The pipe will either need to connect to the existing perimeter foundation drain tile and sump pump, or be daylighted

through a trench downhill somewhere if there is an available slope. If a door rather than a window is installed, electrical work also is necessary, for an exterior light fixture. Railings or a removable cover at the top of the areaway also will need to be installed.

Yes, the required egress window can be an expensive project. But abolishing the public hearings for accessory apartments neither reduces the cost or eliminates the need for safe egress. The "cost" excuse for abolishing public hearings, in this context, is misleading and not germane.

Enforcement unworkable

Enforcement of some of the proposed ZMOD criteria also is unlikely and unworkable. Staff has suggested an occupancy cap on the "ALU" accessory apartments, but without any actual monitoring of leases or occupancy, and the details seem impractical. For example, it may be impermissible to discriminate against couples or individuals who have babies, and there may be Virginia Fair Housing Act https://law.lis.virginia.gov/vacodepopularnames/virginia-fair-housing-law/ implications for doing so. For example,

§ 36-96.3. Unlawful discriminatory housing practices
A. It shall be an ***unlawful discriminatory housing practice*** *for any person to:*

1. ***Refuse to sell or rent*** *after the making of a bona fide offer or refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, national origin, sex, elderliness, source of funds,* ***familial status****, sexual orientation, gender identity, or status as a veteran;*

2. ***Discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in the connection therewith to any person because of*** *race, color, religion, national origin, sex, elderliness, source of funds,* ***familial status****, sexual orientation, gender identity, or status as a veteran;*

3. ***Make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination or an intention to make any such preference, limitation, or discrimination on the basis of*** *race, color, religion, national origin, sex, elderliness,* ***familial status****, source of funds, sexual orientation, gender identity, status as a veteran, or disability.*

And *"Familial status" means one or more individuals who have not attained the age of 18 years*

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being domiciled with (i) a parent or other person having legal custody of such individual or individuals or (ii) the designee of such parent or other person having custody with the written permission of such parent or other person. The term "familial status" also includes any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years.

See also the Federal Fair Housing Act of 1968 https://www.justice.gov/crt/fair-housing-act-2 .

It is unclear exactly who is to be punished for a ZMOD occupancy violation, the landlord or the tenant, and what the consequences are. Is the apartment forfeited, or the tenant simply evicted? Is there a financial penalty? Is the accessory apartment permanently prohibited, or is there a cooling off period? Must the apartment be demolished, or simply left vacant? It is unclear whether a divorced parent residing in an accessory apartment can have visitation with a child or multiple children on weekends, or shared custody throughout the month, and at what point that activity becomes a violation. May empty-nest parents have college students spend the summer? It is unclear whether two college students can have boyfriend/girlfriend overnight visitors, and how often, and whether these house guests may park their automobiles onsite or nearby. At what point does a house guest become a violation? May a tenant have a series of different house guests throughout the year, and what are the consequences? How will staff keep track of these details, apartment by apartment, week by week? Is there really any serious intent to enforce any of this aggressively and consistently? With the current staffing levels and budget?

Similarly, enforcing a proposed cap on the number of customers for the home businesses seems extremely difficult. A mathematical dimension, such as the height of a shed or the distance from a property line, easily can be objectively measured for enforcement evidentiary purposes. But proving how many customers were at a home business on a specific date may be a mishmash, requiring a lengthy parade of witnesses before the BZA or circuit court, who may or may not be sure of the facts, again complicating any effort to enforce such a cap. What appears, to a complaining neighbor, to be a customer of a business might just be someone visiting a resident of the home, or selling windows door-to-door, or visiting the other business in the house, or even a political candidate canvassing. Does someone sitting in the car count as a customer, even if they are just along for the ride? If a husband picks up his wife at the hairdresser, does he count as a customer? Who gets punished for going over the cap, the customer or the business proprietor, or the owner of the house? What are the consequences? Do you shut down the business, or simply warn them not to do it again? How on earth will staff keep track of the comings and goings, and for lots with home businesses in both the house and the ALU, which customers were for which use? Again, is this an ordinance standard which staff seriously intends to enforce, on a consistent

basis, countywide? It is an open secret that many adopted zoning ordinance provisions (e.g. places of worship, basketball hoops) are not now and never will be enforced. These new meaningless "caps" seem likely to fall in that category, and further aggravate citizens already frustrated by weak enforcement.

Zoning enforcement can be painfully slow and uncertain, adding to citizen frustration. Contested zoning violation cases, even if moving quickly, can take perhaps 18 months to get to court, after a citizen complaint, through no fault of staff. The system is entirely complaint driven, and enforcement activity remains on hold, so long as an accused violator has a pending appeal. Following a complaint, staff must research the background, and decide whether a violation letter should be issued. Someone needs to sign for the certified letter, and the recipient then has 30 days to appeal to the BZA. There may be acceptance issues with the appeal paperwork; even if not, the public hearing has to be scheduled with the BZA, which may take another 90 days, and the public hearings many of those cases are continued, at the request of the appellants or staff, for whatever reason, some a dozen times or more. Under the state code https://law.lis.virginia.gov/vacode/title15.2/chapter22/section15.2-2308.1/ , on an appeal, the BZA members are forbidden to ask questions of staff or the appellant until the case reaches the horseshoe, at the public hearing, which delay in basic communication frequently requires staff to research answers or consult with the county attorney before a decision. Many contested cases must go through several hearings in order to get basic questions answered. After the BZA votes, either side has 30 days to appeal to the Circuit Court. If the BZA decision is appealed, a writ is issued, and served on county staff, to prepare the record, giving them another 21 or 30 days to respond, which deadline often extended if staff needs more times. After the record is returned, motions may be filed, which are scheduled at least a couple weeks ahead. Many circuit court cases are not set for hearing for some months. Even if the Circuit Court has a hearing, the decision may be taken under advisement. And the judge's decision can be appealed to the Virginia Supreme Court, which may entail another 9 or 18 months. In the meantime, the appellant can continue doing whatever they were doing, which makes it appear that the original complaint accomplished absolutely nothing; the delays tend to frustrate complaining neighbors. This timeline for zoning enforcement, in many situations, is automatically too protracted to be meaningful, particularly on issues affecting the intensity of activity in the neighborhood.

As to the home businesses, the theoretical cap on customers fails to adequately restrict the intensity of the use, or mitigate the impacts from that added activity on the neighbors. Staff has not proposed any limits on the number of delivery trips, which are at least as impactful as customer trips. Many home businesses, including online sales, might have unlimited and busy deliveries using passenger cars or vans, rather than large vehicles. The cumulative effect of traffic from two home businesses in one house, multiplied throughout some neighborhoods, may have a

detrimental effect. For example, if marijuana is legalized by the Virginia General Assembly https://lis.virginia.gov/cgi-bin/legp604.exe?211+sum+HB2312 in a few weeks, and a home business entrepreneur were to start up a ZMOD home-baked brownie-and-cookie business with online sales, the unlimited delivery trips 7 days a week from a busy operation could be potentially disruptive to neighbors, even if no customers ever visited. Some homes might have two such businesses, one in the house and one in the ALU apartment. Some neighborhoods may have multiple homes with such increased traffic from home businesses. The cumulative impact of all this "live-work-play" activity, with entirely unregulated and unmitigated delivery traffic and noise 7 days a week, may damage the character of quiet residential neighborhoods.

Environmental impact of home businesses on septic

As a longtime resident of the R-C district, with deep concerns for the interaction of land use and the environment, and protection of water quality, I also strongly object to allowing expansion of by right home business uses, such as barbershops and beauty parlors, on septic systems, without notice to neighbors and a public hearing, especially without any mitigation of the environmental effects on the watershed from chemicals such as dyes, bleaches and straighteners. For example, https://www.pumper.com/online_exclusives/2020/07/recommendations-for-a-beauty-salon-on-a-septic-system County staff has indicated that they have no specific standards for safe levels of these chemicals for operation of septic tanks, or the cumulative impacts of these chemicals on groundwater and private wells over time. Staff has no plans to monitor or restrict their use, and concludes that because the County does not regulate them, and these home business uses are restricted in size and customers, therefore these uses are perfectly safe, in staff's judgment. This is illogical. It is reckless and irresponsible to assume that these toxic chemicals are perfectly safe, in the absence of careful scientific study. We should not risk the potential damage from careless expansion of these uses. Fairfax County need not add additional by right uses on septic systems, without knowing the environmental consequences.

Easements on Plats

I personally support one item in the ZMOD draft, the requirement for depiction of easements on application plats, irrespective of width. Many easements on private property are less than 25 feet in width, and many BZA applications seek approval for something at the edge of a lot, where easements may conflict with an application, but are not disclosed on the plat. Currently the BZA is in the dark on many applications, and requiring full disclosure of easement information may help the BZA, staff, and the neighbors understand more clearly what is proposed, and help mitigate stormwater impacts other conflicts.

Conclusion

Without amending a single word in the comprehensive plan, the effective density of single-family neighborhoods countywide is doubled, through ZMOD and its California-inspired social justice/social engineering. Instead of increasing density outright, the pertinent ordinance definitions are effectively gutted and reinterpreted. A single-family house on a residential lot is no longer a house with just the potential for an in-law apartment, it automatically becomes a house plus a market rate apartment plus two home businesses, with signage. The "basement loophole" for larger apartments also facilitates lawful introduction of stacked duplexes into existing neighborhoods, without explicitly using that term. This one-size-fits-all urbanization and intensification may stimulate quiet subdivisions into more "vibrant" communities, and allow more "live-work-play" options. But ZMOD adds too much intensity, arbitrarily depriving neighbors of notice or an opportunity to comment, and without addressing obvious parking or infrastructure impacts. Staff's proposed criteria for apartment occupancy and home business customer caps are impractical and unenforceable, and ignore the unmitigated impacts from unlimited delivery vehicles on neighborhood character. Expansion of home business uses on septic, without any criteria for monitoring or enforcement of safe levels of toxic chemicals, has unknown environmental consequences. Most importantly, abolishing public hearings arrogantly deprives Fairfax County citizens of an important civic privilege, notice and an opportunity to be heard regarding direct impacts on their home from a proposed new use next door. Retaining meaningful citizen engagement in land use should remain a higher priority than trendy social engineering.

I would be happy to answer any questions from you and your colleagues, on any of these issues, either offline or on Thursday night, or after your public hearing, if my observations would help your deliberations, and your recommendations to the Board of Supervisors. I thank you and your colleagues again for your careful consideration of these important issues, and your continued service to Fairfax County.

Very truly yours,

James R. Hart

James R. Hart

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