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JUDGE DECLARES EXPANDED HOUSING OTIONS (EHO) ZONING VOID: County must stop issuing EHO permits

Eighteen months after Arlington residents filed a complaint against the Arlington County Board to have EHO (formerly called Missing Middle Housing) zoning declared void because it violates Virginia law, today Judge David Schell agreed. He ruled from the bench in favor of the Plaintiffs on 4 of the 6 counts in the complaint and declared that EHO zoning is void.

Judge Schell stated that the County may not issue any more EHO permits and that other permits may not be issued for the properties that have received EHO approval to date. This ruling stops EHO development in its tracks.

The ruling voids EHO zoning on substantive grounds. The judge found that the County Board's enactment of EHO zoning "lacked any consideration of localized impacts" of increased density, as required by law and as alleged in Count III of the complaint, and cited stormwater and sewage as examples of this failure. Details of Count III below.

The judge also found that the EHO zoning violates the law in allowing the zoning administrator to approve permits for EHO (Count V). He agreed with the Plaintiffs that the EHO permit requirement means that this is not a by-right process, but instead is a special use permit process, which means that only the County Board may issue these permits.

The Plaintiffs also were victorious on Counts I and VII, detailed below.

This ruling follows the 5-day trial in July during which multiple witnesses testified and hundreds of pages of documents were introduced into evidence.

From the outset, the County Board questioned the Court's ability to hear this case, calling it "a subversion really of our democratic process" and claiming that the case "just cannot happen . . . that's not what the judiciary's role is."

After today's victory, lead Plaintiff Marcia Nordgren stated: "Arlington County underestimated the power of neighbors coming together to fight for the rule of law." She added that the County Board "has spent over $1.1 million dollars of taxpayer money to fight its own residents" and that today the Court "demonstrated that the County's authority is not absolute and must be exercised within the bounds of legal procedures and public accountability."

Dan Creedon of Neighbors for Neighborhoods, which has raised funds from more than 1,000 Arlington donors to support the Plaintiffs' lawsuit, stated today: "The Plaintiffs had the courage to stand up to the Arlington County Board to fight for the rule of law. This case was never about the merits of EHO zoning, but about whether it complied with the law in substance and whether the County followed the law in adopting it."

Creedon went on to say: "Neighbors for Neighborhoods thanks all of the Arlington residents who reached into their pockets to take on the County Board and to the law firm of Blankingship and Keith, which represents the Plaintiffs and brought home today's victory."

The judge ruled on behalf of the Plaintiffs on the counts below. The post-trial brief on these counts is summarized below:

Count I

The County Board did not adopt an initiating resolution to commence the EHO zoning amendment process, as required by Virginia law. The law's purpose in requiring initiating resolutions for zoning amendments is to provide the public with notice so that they can participate in the process about zoning changes in an informed manner from the outset.

- The Board's January 25, 2023 Request to Advertise did not constitute an initiating resolution, as the Board claims, because it did not come at the beginning of the process to amend the zoning ordinance, but at the end, just months before the County Board adopted EHO.
- The Board's claim that the Request to Advertise constitutes the initiating resolution would render meaningless part of the Virginia Code, since the Code has separate sections requiring an initiating resolution and an advertisement.
- The Board's practice of conflating initiating resolutions and advertisements does not excuse it from following the law.

Count III

The Board failed to conduct an analysis of the effect of EHO, particularly at the local level, as required by Virginia law. The law is intended to protect against undue population density with respect to community facilities; traffic congestion; strain on water, sewer, and flood protection systems; among other effects.

- Plaintiffs' expert Christopher Mohn testified that the County conducted no analysis of the impact of EHO at the neighborhood level. The County offered no evidence to the contrary.
- Zoning must be evaluated by what impact is permissible, not what impact is likely. EHO zoning allows development of 290 lots with up to 1,450 units in the first five years, with no limits thereafter. This is in stark contrast to the estimate of 19-21 lots per year (20% of EHO-eligible lots) likely to be developed according to the County consultant's (PES) final report.
- The County avoided any effort at an independent and reasonable assessment of the pace of EHO development. Before issuing its final report, PES estimated that 30-50% of eligible lots per year would have EHO development, but that fact was not disclosed to the public. Even at trial, the County continued to try to hide that fact by objecting to the admission of PES deposition testimony. But that testimony was admitted and showed that PES was urged not to offer opinions that differed from those of County staff, that there was pressure "to move the process along," and that PES did not talk to a single developer in Arlington in preparing its report.
- The Board's conclusion that EHO development would be dispersed across the County, and therefore would not cause water or sewer issues, was not supported by the facts. Instead, PES concluded that EHO would likely be concentrated in certain areas, including near Metro.

- Evidence at trial showed that Elizabeth Thurber, an Arlington County employee, warned her supervisor that: "I cannot state in strong enough words that this is going to be devastating to the already stressed storm water conveyance system." This concern was not shared with the public.

Count IV

Because EHO development can have greater impact in R-districts than single-family dwellings, EHO permits must be approved by the County Board through legislative action – a special use permit – and not by the Zoning Administrator, as EHO zoning provides. The purpose of state law and the County's own Zoning Ordinance in requiring special use permits for uses of potentially greater impact than the zoning district allows is to provide an assessment of the impact of each individual project.

- Despite the County's claim that EHO is by-right development, it is not. Article 5 of the Zoning Ordinance does not allow any multi-family development by-right in R-5 through R-20 districts.
- The permit required for EHO development is the very definition of "special exception" under Virginia law. And, because EHO zoning in Article 10 of the Zoning Ordinance is in conflict with Article 5, which allows no multi-family units by-right, the more restrictive provisions of Article 5 prevail.
- Arlington's own Zoning Ordinance provides that only the County Board can issue special use permits.

- Rather than ignoring the potential localized impact of increased density from EHO zoning, the Board could have conducted studies about this and could have required a special use permit for EHO development.

Count VII

EHO does not comply with the tree planting and replacement standards in the Virginia Code.

- Virginia law controls the amount of tree canopy that a locality can require.
- According to the County's corporate designee, Matt Ladd, developers must comply both with the tree canopy requirements of the Chesapeake Bay Preservation Ordinance and additional requirements for shade trees under EHO. This combination of requirements exceeds what Virginia law allows.
- County staff touted to the public that in many cases the tree canopy for EHO development would exceed what state law requires.
- While increased tree canopy is a laudable goal, the County cannot enforce the tree requirements in EHO zoning because they exceed what is allowed under Virginia law.
- The County's claim that the tree provisions of EHO are severable, and therefore cannot void the rest of the ordinance, fails because the issue of tree canopy was one of the most important factors for the public and the County led residents to believe that tree canopy would be increased.
- The tree provisions are not "incentive zoning" as the County claims because the ability to plant more trees than the law allows is not coupled with any requirement that in return, the developer provide certain design elements or amenities desired by the locality.

Next Steps

Both the County Board and Plaintiffs have the option of appealing the counts on which they lost to the Virginia Court of Appeals. Arlingtonians for Upzoning Transparency (AFuT) has called on the County Board not to appeal the case. AFuT spokesman David Gerk stated today: "The County Board should stop wasting taxpayer money on its expensive private law firm to defend EHO zoning."

Gerk added that the Board also "should not seek a quick fix to remedy the violations of law that the Court found." Instead, he said: "The Board should conduct a thorough and transparent assessment of the Court's legal ruling together with the County Manager's review of EHO zoning implementation, expected by October 1, with robust public engagement."

Below is the text of the AFuT September 5 email to the County Board:

Dear Chair Garvey and Members of the County Board:

In the coming months, the Board has an opportunity to thoughtfully evaluate its Expanded Housing Options (EHO) zoning amendments.

The County Manager has stated that he will present the Board this fall with a report about the first year of EHO implementation. In addition, Judge David Schell likely will issue his ruling this month on the 6-count complaint alleging violations of Virginia law in adopting EHO zoning.

Arlingtonians for Upzoning Transparency (AFUT) requests that the Board consider the County Manager's EHO implementation report and the judge's ruling together. If Judge Schell invalidates EHO zoning on any of the counts, the Board must address that legal error in order to reenact EHO zoning. But rather than moving swiftly to do this, we ask that the Board conduct a thorough assessment addressing both the legal ruling and its EHO policy by asking:

- *Is EHO zoning meeting the Board's goals;*
- *What are the unintended negative consequences of EHO zoning;*
- *Should housing goals be better defined to identify the income levels of those the Board seeks to assist;*
- *What are the housing needs and challenges of this group; and*
- *What policy options should be considered to address housing for this group?*

The Board needs all of the relevant facts to answer these questions.

Does the Board know, for example, the number of single-family homes priced at under $1 million with 3-4 bedrooms (family-sized homes that the Board said are needed) that are to be torn down to build EHO townhouses priced at more than $1.3 million each or 6-plexes that are not affordable to teachers or public safety workers? This includes 4229 S. 16th Street, a 3-bedroom home assessed at $791,100 which has an EHO permit approval for five units. AFUT has this data for all EHO permit applications and approvals.

How should the Board address the assumptions on which EHO zoning was based that EHO development would be dispersed across Arlington and that it would have no greater impact on infrastructure than single-family homes, when in fact, EHO development is being concentrated in certain areas and the size of the approved projects is significantly larger than even the largest single-family home?

Was the Board ever told that in 2022, a County staff member expert in stormwater sent an email to the Department of Environmental Services team that EHO development was going to be "devastating" on the stormwater conveyance system?

Has the Board been briefed on the evidence introduced at trial that its consultant, PES, estimated that as many as 50% of eligible lots would be developed as EHO multi-family buildings, but PES used 20% in its final report after staff said there would be concerns about this scale of development? What impact would the 50% estimate have on Arlington's infrastructure?

The Board will benefit in its assessment of EHO zoning from the experience and expertise of the community. The Civic Federation, AFUT, Arlingtonians for Our Sustainable Future, and others have been closely monitoring the implementation of EHO zoning and have valuable information to share.

We request that after the Board receives the County Manager's report and the after the judge issues his ruling, you establish a process for public engagement to assist you in assessing EHO zoning. This should include at least one public hearing on this topic.

Dan Creedon stated today: "Neighbors for Neighborhoods agrees with AFuT in its call to the County Board not to try to rush through changes in EHO zoning to revive it. With 15 months of EHO implementation, it is clear that this policy is not achieving what the County Board said that it would: housing that is compatible in scale with single-family homes and that is affordable for teachers and public safety workers."

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