FOR IMMEDIATE RELEASE: September 25, 2024

JUDGE TO ISSUE RULING IN ARLINGTON'S EXPANDED HOUSING OPTIONS (EHO) LAWSUIT FRIDAY, SEPTEMBER 27 10:00 a.m. - Courtroom 11A

Judge David Schell will issue his ruling Friday in the lawsuit against the Arlington County Board to have EHO zoning (formerly known as Missing Middle Housing zoning) declared void.

The County Board's motions to have the case dismissed before and during the trial failed. The County Board even questioned the Court's ability to hear this case, calling it "a subversion really of our democratic process" and claiming that the case, brought by Arlington homeowners, "just cannot happen . . . that's not what the judiciary's role is."

Despite these protestations, a 5-day trial was held in Arlington Circuit Court in July during which multiple witnesses testified and hundreds of documents were introduced into evidence. The Plaintiffs' complaint alleges numerous violations of Virginia law in the County Board's enactment of EHO. The Board's defense emphasized its view of the merits of the EHO policy.

The Plaintiffs have asked the judge to declare that EHO zoning is invalid (void *ab initio*) based on each of six counts in the complaint. The judge could rule entirely for the Plaintiffs, entirely for the Defense, or split the ruling with no party winning on all counts.

The Plaintiffs' arguments, as set forth in their post-trial brief (attached) are summarized below.

<u>Count I</u>

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 II

The Board's February 2023 advertisement of the EHO zoning amendments did not include a descriptive summary of the proposed action to amend the zoning ordinance to add EHO zoning, as required by Virginia law. The law's purpose in requiring a descriptive summary of a proposed action is to "is to generate informed public participation by providing citizens with information about the content of the proposed amendments."

- The advertisement was not for a proposed action; instead the draft EHO options included more than 3,800 possible versions of zoning amendments.
- The advertisement listed "standards" that would be included in EHO zoning, but did not indicate which standards would be less restrictive, such as parking, or more restrictive, than current zoning. It did not include tree canopy requirements in its list of standards, but included these in the adopted ordinance. It failed to notify the public that EHO buildings could have up to 8,000 square feet of gross floor area, which is substantially larger than single-family homes.
- No notice was provided that properties in established Planning Districts would not be included in EHO zoning..
- The was no notice, as required by law, that the density range in the zoning map for low density residential would change from 1-10 units per acre to as many as 42 units per acre.
- The measure of the sufficiency of an advertisement is not based on the Plaintiffs, but on whether or not the public at large was sufficiently informed as to who would be affected by the zoning change and how they would be affected.

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.

Count V

Because the Board's enactment of EHO violated the law, as argued in the Complaint, its action is arbitrary and capricious and cannot be fairly debatable.

- The Board failed to consider factors that the law requires for adoption of zoning ordinances, as alleged in Count III. Even worse, the County did not provide relevant facts to the public about the impact of EHO zoning.
- 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.

Standing

Judge Schell already has ruled that the plaintiffs have standing by virtue of their ownership of property that has been rezoned by EHO. The plaintiffs also have standing because their properties are within the zoning districts affected by EHO zoning and there is a substantial risk that they will suffer particularized harm from EHO development, as detailed in the post-trial brief.

Video Clip

Attached is a video clip of resident Joanne Johnson testifying at the County Board's September 14, 2024 Board meeting about the effect that an approved 6-plex to be built next to her will have. Ms. Johnson has filed an appeal to the Board of Zoning Appeals challenging the validity of this EHO permit. This is just one example of how EHO is being implemented in Arlington.

Media Contact:
arlnfnllc@gmail.com