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February 4, 2021

The Honorable Peter F. Murphy, Jr.  
Chairman, Fairfax County Planning Commission  
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Fairfax, VA 22035  
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Re: ZMOD [February 3 Q&A “session”]

Dear Chairman Murphy,

I watched part of the Commission’s Q&A session last night on the Zoning Ordinance Modernization Project (ZMOD) on Channel 16. I appreciate the opportunity to submit further citizen comment, even if actual public testimony was forbidden following the Q&A “session.” Although I have observed thousands of land use public hearings in Fairfax County over the last 38 years, I was disgusted by some of what unfolded during last night’s debacle. I eventually turned off the television.

The nauseating comments of Don Elliott confirmed my worst fears about the arrogant and anti-citizen perspective of our paid consultants, Clarion, and how that consultant mentality may have shaped staff’s echo-chamber approach to the ZMOD process. Staff’s cheerful and yet defensive speeches at the outset, congratulating all the “great work” done to date, not only miss the point, they also reinforce the disappointing conclusions that “staff knows best,” that citizen participation and dissent must be belittled, and that community objections to the major policy changes in ZMOD are relatively minor. Staff sees only their side of ZMOD, they just don’t get it.

Citizen input on zoning ordinance wording is usually offered in a constructive spirit. Many experienced land use and environmental groups, HOAs and civic-minded individuals painstakingly reviewed, or at least tried to review, the lengthy ZMOD drafts, and offer suggestions and criticism, expecting a level of thoughtful excellence in the final product through a good faith effort to reach consensus. For Clarion to categorically dismiss these thoughtful observations as “predictable” annoyances, and to suggest that this product is already in the “punch list” [sic] phase, is disgusting. Staff has obviously spent many hours toiling on ZMOD, but last night it appeared some have drunk the Clarion koolaid as well.

Clarion is supposed to be working for Fairfax County. Maybe the consultants’ top priority at this stage is to sidestep the controversy, just finish up, reap praise and acclaim from the Board for their outstanding work. But the tone-deaf display last night was a sad insult to many civic minded citizens who have tried to contribute in a positive way to this difficult process.

The Commission should welcome constructive citizen input, even when faced with sharp disagreement with County staff or politicians, eager to implement trendy or controversial policy changes without delay. The ZMOD package is a mess, at least in how it is perceived, with a severe disconnect between staff's upbeat spin last night on the one hand, and the community's very troubled consensus response to it. Staff forgets that perception is important to maintaining public confidence in any process. ZMOD also is apparently being rushed through, a ridiculous scramble to meet a meaningless arbitrary deadline for a March 9<sup>th</sup> Board date. No amount of defensive sugarcoating by staff of all the wonderful outreach and brilliant analysis to date, or ignoring the citizen perception otherwise, will change that reality. Rushing ZMOD through, during the virus, with streamlined procedures, in order to meet a meaningless deadline, further confirms the impression of anti-citizen arrogance in control of the process.

I may try again to watch more of the painful PC "session," if it is posted online, and if time permits before your vote. I am not yet familiar with how the new PC "session" procedures will work. It might be helpful, if this sort of streamlining is a preview of things to come, to hold the PC Q&A "sessions" before the public hearings, maybe on multiple nights, so there is adequate time for a complete vetting, and so citizens can testify later, in response, maybe on another night. From my standpoint, the spontaneous questions and follow up from the commissioners themselves also were more insightful than staff's scripted summary of questions from the official "list," which seemed one-sided, possibly edited to justify staff's positions. Vetting is essential, but the scripted "list" procedure seemed one-sided and superficial, crafted to confirm staff's answers, rather than crunch through the implications of difficult questions. I also had assumed the commissioners would be the "Q" side of the "Q&A." I had not realized that staff also would be such a substantial piece of the "Q", which diminished the value of the discussion.

In any event, I did pick up on several specific comments from staff, which weaknesses I might have mentioned, or tried to, in live testimony, if allowed the opportunity. [Frankly if commission questions are abolished, there is very little point in a speaker even bothering to call in.] I hope these selected comments are taken in a constructive and helpful spirit, not dismissed as "predictable" or trivial "punch list" complaints.

**PARKING:** If I understood correctly, staff now proposes an additional standard, requiring a parking space for ALUs and HBBs. That simplistic one-size-fits-all approach fails to mitigate obvious impacts on neighbors. Most couples have two cars. Presumably most couples residing in the accessory apartments will have two cars. Two college students, or two young singles, renting an ALU, will have two cars, and maybe boyfriend/girlfriend and guests' cars with some frequency. The vehicles associated with HBB traffic, for employees and customers, and deliveries, also have to go somewhere. More than one car, undoubtedly.

Even before ZMOD, many neighborhoods, particularly P districts and R-3, R-4, R-5, already suffer from parking stress, negatively impacting quality of life. Some of these neighborhoods have no physical space to absorb the additional cars from the second household. Abolishing the public hearings for these new uses prevents any substantive review of the parking impacts, especially the cumulative impact in a congested area.

Even if an applicant could squeeze in one new parking space in the front yard of P district or small lot R district homes, and still stay under the 30% impervious coverage standard [difficult, especially on triangular cul-de-sac front yards] this additional pavement adds to impervious surface, without any mitigation of incremental stormwater impacts. Some older neighborhoods have terrible drainage already. Paving another parking space in the front yard tends to detract from residential character, and may require removal of the only existing tree on a small lot, or degrade its health, incrementally adding to tree cover issues and global climate change. While the County politicians pay lip service to environmental protection, ZMOD policies degrading the environment, such as abolishing public hearings and any chance of development conditions mitigating potential impacts, contradict that image.

**APPEALS OF ADMINISTRATIVE DECISIONS:** The zoning administrator is technically correct that administrative approvals of HBBs and ALUs theoretically could be appealed to the BZA, and force a public hearing. But this theoretical possibility leads nowhere. An appeal to the BZA of an administrative decision is allowed under § 15.2-2309, subsection 1 <https://law.lis.virginia.gov/vacode/title15.2/chapter22/section15.2-2309/>, but must be filed within 30 days, under VA. CODE ANN. § 15.2-2311, subsection A <https://law.lis.virginia.gov/vacode/title15.2/chapter22/section15.2-2311/>. Without any notice to the neighbors, the 30 day deadline runs out without a timely appeal. The approval becomes a “thing decided” under Gwinn v. Alward <https://law.justia.com/cases/virginia/supreme-court/1988/850698-1.html> and its progeny, and unappealable. Neighbors cannot appeal what they never heard about.

And although an SP public hearing allows a level playing field, the standards on an appeal are much more severe. The zoning administrator’s decision is presumed correct, and the appellant has to show that the staff decision was plainly wrong. With subjective standards, anything debatable will not be overturned on an appeal. Nor can the BZA impose development conditions modifying the zoning administrator’s approval so as to mitigate any specific impacts, unless there is an advertised SP public hearing. And the appeal filing fee of \$600 ironically is higher than the applicant’s filing fee of \$435 for an ALU. So the appeal option for an administrative approval is a more expensive waste of time, usually a dead end, even if the BZA is an impartial audience who can hear neighbor objections. The imposition of development

conditions to mitigate impacts from a use still requires a public hearing.

Commissioner Ulfelder also is correct about “standing,” a complicated legal issue. Neighbors and HOAs might not necessarily have standing to appeal. I don’t know why the Rappahannock case mentioned by the zoning administrator has to remain confidential. Here it is: <http://www.courts.state.va.us/opinions/opnscvwp/1120874.pdf>

**HOAs:** More superficial doubletalk and argle-bargle. If I understood correctly, staff said that they thought they sent a letter to CAI (the Community Association Institute) awhile back, and they never heard back from them, so that was good enough for staff. No. Not on something as complicated as ZMOD, with major policy changes impacting thousands of neighborhoods.

While it is technically correct that ZMOD is not going to invalidate covenants, it is also true that with the “no notice” consequences of abolishing the SP public hearings, the neighbors and the HOA may never find out what has been administratively approved, aggravating those conflicts. You can’t enforce until you find out something is happening. An HOA’s efforts after the fact to enforce something at the HOA’s expense might be avoided, with the courtesy of notice and a neighborly discussion before the public hearing process. And with the level of resident unsophistication regarding the interaction of covenants and zoning, and the frequency of language issues, many citizens who tried to do the right thing and get a “County approval” will not easily understand why the HOA is now complaining, after the official county employee at the official counter took their money and their form, and gave them an official permit for their ALU or HBB or whatever. This unnecessary compartmentalization insulates staff from covenant battles, but adds to the perception of unfairness by both homeowners caught in a procedural web, and an HOA and neighbors unaware of administrative approvals. Messier uglier resolutions, after money has been spent, are the result. Covenants also may or may not be valid or enforceable, even if neatly typed, and HOA paperwork may be susceptible of invalidation because of informality over the years or lack of enforcement. The financial burden of any investigation, evaluation and enforcement of the consequences of a quiet administrative approval also is placed on the HOA, which may or may not be able to accommodate that dubious activity within its budget.

**SEPTIC/ENVIRONMENTAL IMPACTS:** Yikes. I heard something to the effect that staff “spoke with someone at the health department at some point, and they felt there would be no impacts on wells.” Not good enough, not nearly. What was the extent of that research project, and was a professional evaluation and report prepared regarding chemicals from HBBs such as beauty parlors and barbershops, or cumulative addition of ALUs? Or was this a 15 second phonecall with someone’s receptionist or assistant?

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Water quality and the environment, and emerging environmental effects of CECs, contaminants of emerging concern, deserve more than a flippant and perfunctory dismissal. Staff has failed and refused to pursue this issue, and identify any safe levels of toxic chemicals, or evaluate the long term environmental effects from HBBs such as beauty parlors and barbershops. What are the impacts on private wells, on the watersheds, on the Occoquan Reservoir and Chesapeake Bay, on the food chain? And a vague phone call to the Health Department clears that up definitively? Of course not. And the citizens deserve much more detailed answers on these issues before expansion of uses on septic with toxic chemicals. Environmental impacts of ZMOD and adding ALUs and HBBs on septic should be carefully analyzed, not ignored or belittled.

**CONCLUSION:** I realize the Commission is under the gun on this project, for whatever reason. So I wanted to “comment” promptly, at least on the portion of last night’s debacle I could force myself to watch. I may share additional specific comments, if I can stomach watching the painful Q&A “session” sometime between now and your vote. In the meantime, I am happy to answer any questions, if it would help. And I apologize for the length of this apparently “predictable” response. If I had more time, I could have made it shorter.

I thank you personally for your patience with a difficult topic. I thank you and your colleagues again for your careful consideration of these important issues, and your continued service to Fairfax County. Stay safe and healthy.

Very truly yours,

*James R. Hart*

James R. Hart

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