

May 7, 2020

The Honorable Jeff McKay and Distinguished Members of the Board
c/o Office of the Clerk of the Board
12000 Government Center Parkway, Suite 530
Fairfax, VA 22035

RE: Uncodified Ordinance to Establish Methods to Assure Continuity in Fairfax County Government and Conduct of Board of Supervisors Meetings During the Novel Coronavirus 2019 (COVID-19) Emergency.

Dear Chairman McKay and Distinguished Members of the Board,

We are citizen volunteers, active in our communities and we want to thank you for your dedication during this pandemic. We also appreciate the invaluable services and information on COVID-19 that your various offices continue to provide in real time to help our communities.

However, we do have several serious, specific concerns about the uncodified ordinance mentioned above, which the Board of Supervisors passed at its meeting on April 14, 2020. **It is our assessment that the guidelines the BoS has adopted are extremely broad and vague and could lead to actions that exceed the intent of Governor Northam's executive order. We respectfully request that the Board address the following concerns:**

1. USE OF THE STREAMLINED PUBLIC HEARING PROCESS SHOULD BE LIMITED TO EMERGENCY MATTERS ONLY.

Section D of the uncodified ordinance, Board of Supervisors' Meeting Procedures, item 3.(B).2 states that the meeting will be held without permitting any of the public to be physically in the same location as any of the Board members, but alternative arrangements for public access will be made. Such alternative public access may be through electronic communication, including but not limited to audio, telephonic or video broadcast.

However, to say that citizens are adequately represented because they can access an alternative means of communication to voice their concerns at a BoS hearing, is to ignore the negative impact of the current lockdown on citizens' ability to coalesce over board matters that normally would be of shared concern.

As you know, giving one's opinion at a BoS public hearing, whether in person, in writing or through an electronic means of communication, is often the *final* step in civil engagement in the legislative process. Civic engagement also involves the ability for affected communities, such as those we represent as civic association and HOA leaders, to bring citizens together over common purpose in advance of a hearing. It involves citizens meeting with various Supervisors to have an exchange of ideas and information. It involves site visits to understand a proposed land use application and it involves meeting with an applicant to discuss and try to reach a compromise on any issues of concerns. At times, it involves going door to door to speak with neighbors about

particular proposals. In the current pandemic situation, all of these meetings and discussions are extremely limited at best. Moreover, at this time citizens are necessarily distracted by more immediate concerns, such as working from home, losing employment and/or income, home schooling our children, finding scarce supplies, aiding elderly neighbors and relatives who are particularly confined and stepping up support for others within our communities.

Our request: During this time of streamlined public hearings, narrow your focus to consider only those decisions related to the emergency and/or the most straightforward and routine issues of governance. All nonemergency matters which require sufficient public input, especially land use issues and zoning issues, should wait until public meetings are allowed again.

2. BE MORE SPECIFIC ABOUT WHAT IS/IS NOT MEANT BY “MEASURES THAT HELP SUSTAIN THE COUNTY’S ECONOMY”.

All of us are definitely in favor of maintaining Fairfax County’s economy, however, we find item C.6 of the ordinance to be excessively vague in nature. We would like to receive some clarity on what type of measures the Board of Supervisors would include in this category. Is the Board referring to continuing measures that are already in place and need to be approved at regular intervals or is the Board also referring to new applications for land use or zoning? As it is currently written, **item C.6** is a black hole into which almost any type of application can fit.

Our request: We strongly suggest that the Board of Supervisors places clear and objective limits on item C.6 and that land use and zoning issues not be included in this category. During this pandemic, a lack of clarity leads to a lack of transparency.

Furthermore, we strongly urge that Section D, Board of Supervisors’ Meeting Procedures, item 3.(3) be implemented to justify individual decisions. This item states, “Before actions may be taken on any item, the Board must first approve that the item or items are necessary to assure continuity in Fairfax County government and that the usual procedures cannot be implemented safely or practically. A motion may be made and voted upon before each item or as to the entire agenda, as may be determined by the Chairman.”

Our Request: We strongly suggest that a motion be made and voted upon before *each* item heard by the Board and that the vote be recorded.

3. BRING TIMELINE OF EMERGENCY MEASURES INTO ACCORDANCE WITH STATE TIMELINE.

We are also concerned about Section E, Supersession or Suspension of Inconsistent Requirements, item 3, which states “That this ordinance may remain in effect no longer than six months after the Board of Supervisors terminates the local Declaration of Emergency.” In Attorney General Mark Herring’s opinion dated March 20, 2020, he stated that “such ordinances must be limited in effect to a period not exceeding six months and shall provide a method for the resumption of normal governmental authority by the end of the six-month period.” This is in accordance with VA Code Section 15.2-1413. If we are reading the uncodified ordinance

correctly, it appears that the BoS is not just placing the ordinance in place for six months, but is placing it in effect for **up to six months after** the Board terminates its local Declaration of Emergency.

Attorney General Mark Herring's opinion on this issue states that "the General Assembly did not intend for public bodies to handle all business through electronic communication means, even during a declared emergency" and that "public bodies should carefully consider whether taking a given action during a meeting held by electronic communication means is truly essential and should defer any and all decisions that can be deferred until it is once again possible to meet in person."

Our request: Bring the timeline for Fairfax County's emergency measures into accordance with the six month limit as interpreted by the Attorney General in his opinion dated 3/20/20 and do not hold electronic hearings for land use nor zoning issues.

4. BALANCE LOCAL GOVERNMENT'S EXERCISE OF ITS AUTHORITY WITH THE SPECIAL CIRCUMSTANCES ASSOCIATED WITH THE COVID-19 PANDEMIC.

We also want to make it clear, that none of us are questioning the Board's zoning authority. As Chairman McKay has pointed out, the highest courts of our state and nation have recognized "a local government's exercise of its zoning authority 'is one of the most essential powers of government, one that is least limitable.'" *Bd. of Supervisors v. Bd. of Zoning Appeals*, 604 S.E.2d 7, 9 (Va. 2004) (quoting *Hadacheck v. Sebastian*, 239 U.S. 394, 410 (1915)). We are simply questioning the decision of the Board of Supervisors in pressing ahead on matters that should include robust and full participation by residents, at a time when a significant percentage of residents are not able to fully focus and engage in the legislative process.

We would like to point out that other localities, such as the City of Alexandria, have suspended land use meetings until June and will not resume public hearings until after Governor Northam's Stay-at-Home-Order is lifted.

Our request: That the Fairfax County Board of Supervisors follow the example of the City of Alexandria in relation to public hearings.

In summary, we the undersigned, strongly urge the Board of Supervisors to continue to deal with emergency and routine governmental business but **not** to accept applications for land use nor zoning issues during this unprecedented emergency. Also, we urge the Board to provide the citizens of Fairfax County with an abundance of clarity and transparency in any decisions which they make during this time.

Thank you for your time and consideration of this request. We look forward to your response.

Sincerely,

CC: Governor Ralph Northam
Attorney General Mark Herring