YIMBY LAW

Arlington's Missing Middle Case: Updates

Marcia L. Nordgren v. County Board of Arlington

The Initial Lawsuit: *Marcia L. Nordgren v. County Board of Arlington*

On March 22, 2023, the County Board of Arlington changed the County's zoning ordinance, by allowing for by-right development of up to six-units of housing on the same size lot as a single-family home. Known as the "Expanded Housing Option" (EHO) Amendment, this change was meant to provide more housing at more affordable prices. This amendment made Arlington the first jurisdiction in Virginia and one of the first in the country to end single-family-only zoning.

Perhaps predictably, the zoning change resulted in a lawsuit by nine residents of Arlington County, who brought about the usual concerns that come with development–traffic and congestion, parking issues, stormwater run-off, and school crowding. In the legal complaint and during the trial, the plaintiffs argued that the County Board's decision to allow new housing types in their neighborhoods was done improperly and unlawfully without proper consideration for impacts on current residents.

On September 27, 2024, a Circuit Court judge ruled against the Board on four of the seven counts brought by the Plaintiffs, voiding the EHO Amendment to be *ab initio* (from the beginning). In overturning the County Board's adoption of the EHO zoning amendments, the judge cited improper procedure and unlawful delegation of authority. Consequently, holders of EHO permits were left in legal limbo, the NIMBY Plaintiffs celebrated the blocking of housing, and the County's housing shortage went on.

In November 2024, the Arlington County Board voted to appeal the Circuit Court judgment.

The Appeal

The County Board has brought an appeal challenging both (1) the standing of the Plaintiffs to bring the lawsuit in the first place, and (2) the Circuit Court's holdings on Counts I, III, IV, and VII, stated below:

Count I.	The Board failed to properly initiate the adoption of the EHO Amendment.
Count III.	The Board failed to reasonably consider many factors under VA Code when adopting the EHO Amendment.
Count IV.	The Board unlawfully delegated *legislative* authority by granting by-right special exceptions for EHO development and delegating issuance of EHO permits to administrative staff.
Count VII.	The landscaping provision of the Zoning Amendment acts contrary to VA Code.

Argument #1: The plaintiffs lack standing to bring the lawsuit.

Standing is required in order to bring a lawsuit. Those who have 'standing' are individuals or entities that are "aggrieved" (a.k.a., harmed or impacted) by the subject matter of the suit. To put it plainly, someone with standing is someone whose rights will be directly affected by the outcome of the case.

The County Board of Arlington states that "[t]his case should be decided on the single, dispositive issue of standing." It claims that the plaintiffs needed to prove any legally identifiable harm from a zoning ordinance that (1) did not limit their use of their property and (2) would have no impact that is unique to them, and they failed to do so.

First, the plaintiffs failed to establish standing as property owners in "close proximity" suffering a *particularized* harm, meaning a harm that affects them in a "personal and individual way." Not only were none of the plaintiffs' property adjacent to or even on the same block as any of the approved EHO permits, their concerns were also shared by other citizens who also live in a densely-populated area. Second, the mere fact that the plaintiffs owned property in the EHO districts (R-5 to R-20 residential districts) does not give them standing. The plaintiffs even admitted that EHO development posed no harm to any property right in or to the use of *their own* properties.

In sum, the standing given to the plaintiffs in this case were based on *alleged harms* that *could* result from other individuals or entities that *might* use *their own* properties under the EHO Amendment. As plaintiff Nordgren put it: "[w]e're dealing with hypotheticals." The County Board argues that these hypothetical harms should not have been enough to give the plaintiffs standing to sue.

Argument #2: The Appeals Court should reverse the local court judgment and find in favor of the Board on Counts I, III, IV, and VII (as laid out below).

Count I. The Board properly initiated adoption of the EHO Amendment.

The Board argues that the trial court misinterpreted § 15.2-2286(A)(7) by adding requirements that are not included in the statute, such as an "actual statement indicating that the county board is resolving to amend the zoning ordinance" when case law demonstrates that "[n]o particular words are required to satisfy the statute. The Board's resolution achieved all statutory public purposes–*i.e.,* public necessity, convenience, general welfare, or good zoning practice"–and satisfies the statutory requirements. Additionally, the trial court wrongly imposed a "two-step process" that lacked statutory basis as there is no resolution required for the advertisement of public hearings.

Count III. The Board's action is 'fairly debatable' and it reasonably considers the statutory factors under VA Code.

The Board argues that the trial court wrongly determined that the Board failed to give "reasonable consideration" of "the localized impact" of EHO development by searching for "inconsistencies" in the legislative record and credited the plaintiffs' evidence while ignoring the Board's. Instead, the court should have acknowledged the mountain of evidence that demonstrated that the EHO Amendment was reasonable and that the Board applied good practices when enacting the EHO Amendment rather than voiding it. Essentially, the Board argues that VA Code § 15.2-2284 leaves the level of consideration and weighing of statutory factors to the Board, not the Courts nor litigants.

Count IV. The Board lawfully delegated legislative authority by granting by-right EHO development and delegating issuance of EHO permits to administrative staff.

The Board argues that the trial court's holding relies on two *false* theories: (1) administrative permits are special use permits and (2) EHO development is a special exception. Neither of these are true. EHO housing is allowed as a by-right use, with a routine administrative permit issued by the zoning administrator who simply implements the standards that the Board has already adopted. The only time an EHO development needs a special exception "use permit" is for lots greater than one acre. The Board points out that if the need for an administrative permit transformed by-right EHO development into a special exception, single-family homes would become special exceptions as they also require an administrative permit.

Count VII. The Landscaping Provision is valid.

Lastly, under Count VII, the Board argues first that the plaintiffs have no standing and that it does not conflict with relevant state code. Alternatively, even if it did conflict with the code, the Landscaping Provision should be severed rather than render the entire EHO Amendment void.

Meanwhile, the Appellees (Nordgren, et al.) only bring one argument– that the Circuit Court erred by not determining that the County Board of Arlington's actions in adopting the EHO Zoning Amendment were not "arbitrary and capricious." An 'arbitrary and capricious' act lacks a reasonable basis and is made without proper consideration or justification. The Circuit Court, while rendering the EHO Amendment void, did not go so far as to make this claim because it is too broad and general and the plaintiffs had no evidence to back it up.

Here Comes Wilson Ventures

Wilsons Ventures, LLC–holder of two EHO permits–has moved to intervene in the appeal. Intervention allows a nonparty to join ongoing litigation to protect their interests as related to the case. Wilsons Ventures previously sought to intervene at the trial court level but was denied for untimeliness. That denial is now the subject of a separate appeal (Record No. 2122-24-4).

In its new motion, Wilsons Ventures requests one of three outcomes: (1) to join the ongoing appeal, (2) to consolidate its separate appeal with the County Board's, or (3) to dismiss the County Board's appeal and vacate the lower court judgment for failing to include all necessary parties, sending the case back to trial court. While every option would further delay resolution, Wilsons Ventures argues intervention is essential to protect its and other EHO permit holders' property rights, which it states are directly at stake.

After the EHO Amendment passed, Wilsons Ventures purchased real property and began development. It was approximately 95% complete on one group of homes–awaiting only a certificate of occupancy–when the trial court's ruling and final order prohibited the County from issuing any more permits in service of any EHO permits. Although a partial stay later allowed EHO permit holders to conditionally proceed with their projects, the projects essentially became unmarketable and possibly uninhabitable.

The Court of Appeals must now decide whether the trial court erred in finding that Wilsons Ventures was *not* a "necessary party," i.e., one whose legal interests are likely to be "diminished or defeated" by the outcome of the case. Wilsons Ventures argues that neither the plaintiffs nor the County adequately represents the interests of EHO permit holders, all of whom face potential loss of property rights.

Both the plaintiffs/appellees and the County oppose Wilsons Ventures's motion, citing its failure to timely intervene. However, the plaintiffs agree to consolidation if the Court denies their motion to dismiss Wilsons Ventures's request.

What does all of this mean for the case?

It essentially means more waiting–waiting for the Court to decide whether Wilsons Ventures can join the lawsuit, waiting for Appellees to file a response brief, etc. Appellee Nordgren has filed a motion for extension of time to file their response brief due to their also filing a motion to dismiss Wilsons Ventures Motion to Intervene, arguing that the Court should stay briefing in the appeal until the Wilsons Ventures Motion is resolved. In that situation, the *County Board v. Nordgren* case could be delayed for months while the Court reviews and decides on the Wilsons Venture appeal. This again leaves EHO permit holders and other developers who may have been interested in EHO development in limbo, as well as County staff who are prohibited from issuing any EHO permits that were in process at the time of the September 27 ruling.

Worse case scenario–*besides* the Court of Appeals upholding the Circuit Court's judgment (and likely triggering further appeals from the Board)–the Court could choose to dismiss the appeal, vacate the judgment, and remand (return) the case to trial court. As such, the process would reset back to beginning, resulting in further time and money taken up by the suit. Furthermore, this will continue to exacerbate the housing crisis, especially as some EHO permit holders have begun pivoting projects to single-family homes instead while others have simply not filed any new development plans.