

October 28, 2024

ASF Excerpts of Judge Schell's Decision on Arlington's Expanded Housing Options (EHO) Zoning Policy

The following items were excerpted from a [written decision by Judge David Schell](#) from Arlington Circuit Court on October 25, 2024. Text in bold is directly from the decision.

Missing Middle was "missing an analysis of impacts at neighborhood level"

The plaintiff's expert on planning and zoning testified that the proposal was missing an analysis of impacts at the neighborhood level where the EHO development would occur. This evidence was not contradicted by the defendants' witnesses.

SEWERS: County's water/sewer/streets chief admitted no localized analysis

The chief support engineer for the county's water, sewer, streets department, testified that he evaluated the EHO development on sanitary sewers on a system wide basis but did not do so on a localized basis. No documents considering the localized impact of EHO were known by him.

STORMWATER/WATERSHED: County "did not analyze"

The Watershed Manager in the Department of Environmental Services for the county admitted that they did not analyze whether there would be any adverse effects from EHO development at the neighborhood level.

County "only retained one outside consultant" who "was instructed to avoid disagreement with the staff because public" will FOIA it"

The county only retained one outside consultant to assist them in evaluating the impact of EHO. That outside consultant will be known as the primary consultant for the purpose of this ruling. The evidence supports the view that the primary consultant for the Board regarding EHO was instructed to avoid disagreement with the staff of the county because the public “will FOIA it,” Pls. Ex.98 PES Dep. 179:20-181:1. The primary consultant understood that to mean “we shouldn’t be making recommendations that didn’t comply with the policy decision that had been made by the County.” Further inquiry resulted in the testimony that the primary consultant was “[not] to be on record making recommendations that didn’t comport with the staff’s judgment as to what could be approved, and what was the right thing to do, given all the concerns they had to figure in” Def. Ex. 341 July 12, 2024, PES Dep. Tr. 28: 10-14. These communications took place before the first report to the Board.

Lone consultant tasked to determine what developers would do, but didn’t talk to a single developer.

The primary consultant also testified at deposition that its principal task was to determine what developers would do under the EHO regime. The primary consultant admitted that they did not talk to a single developer” about what they would do or not do” with EHO development Pls Ex. 98 PES Dep. Tr. 109:15-110:18, 113:15-114:4 (Q. “your judgment about what developers would or would not do ... was based upon a review of past behavior that did not include EHO development, correct? A. Yes Q. Without talking to the developers? A. Correct”). Pls. Ex 98 PES Dep. Tr. 137:7-16, 143:10.

Consultant said EHO “would not be evenly dispersed”; yet County told public it would

In addition, the county staff was informed by a third party that the primary consultant had determined that EHO development would be dispersed across the county. This was contrary to the conclusion of the primary consultant that EHO properties would not be evenly dispersed throughout the county. Their analysis was that EHO development would occur in “ more affluent neighborhoods that had higher — higher value properties that could support higher prices and higher rents, yeah, which would suggest near-- metro,” Pls. Ex. 98 PES Tr. 128:16-129:5

Public not told about any of the above

None of the above inconsistencies were brought to the attention of the public at any of the public hearings.

SCHOOLS: County staff “did not use normal operating procedures to assess localized impacts”; impact data altered “by his superior when he was out of the office No explanation was given to him...”; Public never told

As to the schools, the principal planner for Arlington County Public Schools testified that he did not use normal operating procedures to assess localized impacts to schools under EHO. He was asked to evaluate the impact of the EHO amendment on the public school system as a whole by assuming that the EHO development would be dispersed throughout the county and not concentrated in one part. He was also directed to assume that only 19 to 20 lots would be converted to EHO each year. When the principal planner performed this analysis under those conditions, he calculated that 80 to 94 students would be added each year due to EHO construction. The principal planner testified that these numbers on his spreadsheet were changed by his superior when he was out of the office to reflect nine students per year rather than 80 on the low end and 13 rather than 94 on the high end. No explanation was given to him why the numbers were reduced. The principal planner stated that the impact of EHO development potentially is minimized by assuming dispersal throughout the County.

This inconsistency was not brought to the attention of the public at any public hearing.

STORMWATER: “serious concerns...if EHO was implemented;” “superiors” were told; these concerns “were dismissed or not considered for reasons “supported by no study or evaluation”; public not informed

Staff identified serious concerns with stormwater conveyance if EHO was implemented. These concerns were brought to the attention of their superiors. The lead staff member on stormwater infrastructure sent an e-mail to the Department of Environmental services (DES) as follows:

“I cannot state in strong enough words that this is going to be devastating to the already stressed storm water conveyance system. The issue is not just what will happen in flood inundation zones, but that the areas that drain to these zones also contribute to the flow of stormwater into the inundation zones. Areas that are not problematic now will become problematic because the available land for overland relief shrinks, there are no protections for setback from existing storm water drainage pipe networks, and problems with lot to lot grading/drainage will be harder to address and will be magnified.” Pls. Ex. 136 at ArCo-11503.

This staff member continued to the difficulties of making EHO by right:

"It is my opinion that the problem with the current proposal is that it expands by right zoning without and before any requirement is made to analyze and address adverse stormwater impacts. By not including any requirement to address adverse stormwater impacts it will be impossible to try to do so later – we will be told "but it is by-right, you cannot impose any requirements". So the requirement to assess and address adverse stormwater impacts should be along with or before MM becomes by right. Not every location will have or cause adverse impacts, but in some locations, it will be severely adverse. Those need to be addressed before MM becomes by right." Pls. Ex 137 at ArCo_11066.

Another staff member addressed the problem in this fashion:

"we are of course struggling with a stormwater system that is so inadequate on every conceivable level ... the system we have, which is so compromised it lacks elasticity we want to have to absorb these kinds of changes" Pls. Ex. 153

These concerns were dismissed or not considered on the basis that if you are building on the same footprint of a single-family home with a six plex there will be no deleterious effect or increase in storm water drainage requirements. This position appears to be supported by no study or evaluation.

These concerns of staff were not brought to the attention of the public in any meeting.

SEWER BACK-UPS: "it's raw sewage coming into your residence;" Board had "lack of any consideration of the effect" of EHO sewer issues on nearby homes

Ben Quinn, a mechanical engineer and plaintiffs' expert as to sanitary sewage systems explained that some home laterals may not connect or flow sufficiently to stop a backup even though the main sewer line may continue to function.

He stated: "in the best cases, your sewage, your effluent will just back up and it will not drain. In the worst case where there's a significant hydraulic head, you could potentially get your upstream neighbor's sewage in your lowest-lying device, if you will. So, yeah, it's raw sewage coming into your residence, and I've dealt with that in the past in Arlington."

He also stated that he considered locational and neighborhood impact analyses to be benchmark practice for zoning amendments that increase density.

The burden is on the plaintiffs to show that the Board failed the fairly debatable test. In other words, the Board only needs to show some evidence of reasonableness in its decision to defeat this count. The difficulty for the Board in this case is the lack of any consideration of the effect of additional sewer water and stormwater on the local laterals from single family homes along the length of the sewer system. Laterals are defined as the pipes from the homeowner's home to the county sewer system. It appears from the evidence that no consideration was given to the effect of additional influx of sewage from additional units built on the lot where a single-family dwelling once stood. There is no

evidence that the Board considered that a six plex with at least six toilets, additional washing machines, showers, sinks and dishwashers would increase the flow in the county system so that homeowners sharing the sewer line with that six plex will suffer sewage backup into their homes. No study was brought forward that looked at the effect of this additional flow on the laterals coming from single family homes on the sewer system.

The expert for the plaintiffs testified that flooding of individual homes was likely even when the sewer system could operate successfully with a greater flow. The expert emphasized that an examination of the laterals should have been required before a multiplex would be allowed to replace a single family home. No evidence was presented that this potential and likely intrusive sewer overflow was considered. There was some testimony that the builders would be required to deposit a few hundred dollars to the county for maintenance if required by the construction of the new multiplex.

Other than that, there appears to be no consideration of the damage or inconvenience that would be caused by a sewer overflow into a homeowner's home caused by the construction of a multiplex along the common sewer line.