

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF ARLINGTON

MARCIA L. NORDGREN, *et al.*,)
)
Plaintiffs,)
)
 v.)
)
 COUNTY BOARD OF ARLINGTON,)
 VIRGINIA,)
)
Defendant.)
 _____)

Case No.: CL23001513-00

MOTION FOR PARTIAL STAY OF JUDGMENT PENDING APPEAL

COMES NOW the County Board of Arlington, Virginia (the “County” or “Board”), and states as follows in support of its Motion for a Partial Stay of the Court’s Judgment Pending Appeal:

1. On September 27, 2024, the Court ruled that “the EHO zoning amendment is void *ab initio*, and the County Board and the County of Arlington are hereby enjoined and prohibited from issuing permits for or approving applications of EHO development pursuant to the zoning amendment.”

2. Since that ruling, the County has ceased issuing permits for EHO development. However, a challenging question remains regarding how the County should administer projects proceeding under the EHO development permits issued before the ruling. Accordingly, the County moves the Court for a very limited stay, staying enforcement of the ruling as to the projects proceeding under the 45 EHO development permits issued prior to the ruling.

3. The EHO Zoning Ordinance was enacted and took effect on March 22, 2023. Between March 22, 2023 and September 27, 2024, the County issued 45 EHO development

permits to private parties consistent with the EHO Zoning Ordinance. The Court’s ruling puts the County in the difficult position of either: (A) having to revoke those permits, which appears to be the judicially mandated approach; (B) opting to not enforce its single-family zoning ordinance against those permit holders who proceeded to develop multi-family homes, subjecting itself to legal action from citizens opposed to that development; or (C) facing liability under Virginia’s remedial vesting statute, Code § 15.2-2311(C), for depriving permit holders who have materially changed their positions in furtherance of that permit of a vested right:

In no event shall a written order, requirement or determination made by the zoning administrator or other administrative officer be subject to change, modification or reversal by any zoning administrator or other administrative officer after 60 days have elapsed from the date of the written order, requirement, decision or determination where the person aggrieved has materially changed his position in good faith reliance on the action of the zoning administrator or other administrative officer.

4. This Court has authority to enter a limited stay pending appeal. “[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” *Primov v. Serco, Inc.*, 296 Va. 59, 67 (2018) (quoting *Landis v. North Am. Co.*, 299 U.S. 248, 254-55, 57 S. Ct. 163, 81 L. Ed. 153 (1936)). The decision whether to grant a motion to stay pending appeal is a matter of discretion. *Qiu v. Huang*, 77 Va. App. 304, 327 (2023). A stay pending appeal is expressly contemplated by Rule 1:1(B)(a)(3)(B)-(C) of the Supreme Court of Virginia, pursuant to which this Court retains jurisdiction of a case after the expiration of the 21-day period prescribed by Rule 1:1 for purposes of addressing “motions to stay the judgment pending appeal.”

5. When assessing whether to grant a stay pending appeal, Virginia courts must consider: (1) the nature and circumstances of the case; (2) the likelihood of irreparable harm if not stay is issued; (3) the veracity and magnitude of the asserted harms resulting from not granting a

stay; and (4) where the public interest lies. *See Wash. Gas Light Co. v. Zinner (In re Feb. 2, 2022)*, 2024 Va. Cir. LEXIS 20, *9-10 (Fairfax Feb. 14, 2024). In addition to those factors, some Virginia courts evaluate whether the stay applicant has made a strong showing that he is likely to succeed on the merits, in line with the injunction factors in *Hilton v. Braunskill*, 481 U.S. 770, 107 S. Ct. 2113, 95 L. Ed. 2d 724 (1987) and *Winter v. NRDC*, 555 U.S. 7, 22, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). *See, e.g., Jeffrey v. Commonwealth*, 77 Va. App. 1, 13 (2023). However, “[g]iven the Virginia Supreme Court’s reticence in adopting the *Winter* test, . . . factors cited by the Supreme Court in the context of injunctions are likely not relevant on a motion for a stay, such as the absence of an adequate remedy at law, or a likelihood of success on the merits.” *Zinner*, 2024 Va. Cir. LEXIS 20 at *10.

6. The County will be appealing the Court’s ruling and, given the nature and circumstances of this case, which implicates the property rights of existing EHO permit holders, the County’s ability to administer those permits, the County’s regulation of development within its borders, a limited stay of the Court’s ruling pending appeal is the most appropriate way to preserve the status quo. *See Thompson v. Fairfax Cty. Dep’t of Fam. Servs.*, 62 Va. App. 350, 377 (2013) (“the purpose of a stay pending appeal ‘is to preserve the status quo pending appellate determination.’”) (citation omitted).

7. Furthermore, as touched on above, the County will face irreparable harm absent a stay. Indeed, as to the 45 existing EHO permit holders, the Court’s ruling places the County between a rock and a hard place, such that any action by the County taken in furtherance of the Court’s ruling exposes it to potential liability—a “Catch 22.” This regulatory conundrum is compounded by the interplay between state laws and regulations and the County’s Zoning Ordinance. While the Court has enjoined the County from issuing permits for EHO development,

which would prevent the County from issuing EHO permits and certificates of occupancy from the zoning administrator, it is unclear whether the Court's ruling would also supersede state code which mandates procedures for the County's review of applications for land disturbance permits and building permits for projects covered by the EHO permits.

8. Importantly, given the narrow scope of the stay, any impact of the stay will not substantially injure Plaintiffs, as only 45 EHO permits have been issued by the County to date, for properties which, throughout the litigation, were already at varying stages of development. In other words, for those 45 properties, the impact on Plaintiffs was no different before than after the Court's ruling. In addition, the limited nature of the requested stay means that no additional EHO permits will be issued by the County. Instead, the Court's ruling will only be stayed as to the limited number of existing permit holders, some of whom have already sought to intervene in this case.

9. In light of the difficulty faced by the County in order to administer the Court's ruling as to those 45 permit holders, the potential for blight and public safety hazards should any of the 45 permitted EHO developments be administratively stalled at varying stages of completion (*e.g.*, a half constructed building or an open hole dug for a basement), and the clear recognition by the General Assembly that property owners should be entitled to rely upon the statements and actions of zoning and administrative officers (Code § 15.2-2311(C)), the public interest favors the requested limited stay.

10. Finally, to the extent it is relevant to the Court's consideration, there is a substantial likelihood that the County will succeed on the merits of its appeal. The Court itself has acknowledged that there is no binding precedent on some of the issues presented; and, for the

reasons outlined in the County’s Post-Trial Brief, there is substantial basis for the County’s positions in this case. Therefore, this factor weights in favor of a stay.

11. Because the nature and circumstances of the case warrant a limited stay, the likelihood of irreparable harm to the County absent a stay is significant, the magnitude of potential harms from not granting the stay are *de minimis*, the public interest favors granting the limited stay, and the County is likely to prevail on the merits of its appeal, the requested stay should be granted.

WHEREFORE, the County respectfully requests the Court grant a limited stay, staying the Court’s judgment pending the County’s appeal of this matter, as to the 45 EHO permits previously issued by the County, and grant such other and further relief as the Court deems just and proper.

Dated: October 18, 2024

Respectfully Submitted,

COUNTY BOARD OF
ARLINGTON COUNTY, VIRGINIA

By: /s/ Ryan J. Starks
Of Counsel

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of October, 2024, I filed the foregoing using the TrueFiling System for the Arlington County Circuit Court, and sent a true and exact copy of the foregoing by email to the following counsel of record for Plaintiffs:

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