In the

Supreme Court of Virginia

At Richmond

211143

DAVID BERRY, ET AL.,

Appellants,

– v. –

BOARD OF SUPERVISORS OF FAIRFAX COUNTY,

Appellee.

BRIEF OF AMICI CURIAE THE HOME BUILDERS ASSOCIATION OF VIRGINIA AND VIRGINIA ASSOCIATION FOR COMMERCIAL REAL ESTATE IN SUPPORT OF PETITION FOR REHEARING

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INTRODUCTION

Contrary to the Residents' (as they styled themselves) assertions to this Court, the *Amici* respectfully suggest that the Court's March 23, 2023, decision has already had a significant adverse effect on local governments and private sector entities statewide. The Court's reasoning has cast a cloud over a vast number of land use approvals and permits, not just in Fairfax County but throughout the Commonwealth. These include decisions on land use applications that were filed in good faith by applicants pursuant to the Fairfax County Zoning Ordinance, and processed and acted on by the Board of Supervisors and Board of Zoning Appeals in a manner the County determined was consistent with state law, local ordinances, an opinion issued by then-Attorney General Mark Herring, and recommendations by public health officials. Moreover, a cursory review of public records from different regions of the Commonwealth reveals that Fairfax County was not alone in its assessment. This Court's ruling thus implicates actions taken by public bodies of numerous other Virginia jurisdictions that also conducted electronic meetings prior to July 1, 2021. The number of applications potentially impacted by the Court's decision cannot be understated.

Because of the widespread impact of the Court's decision, the *Amici* respectfully ask the Court to clarify its decision in this case, and specifically state that its ruling applies only prospectively to all public bodies other than the Fairfax

County Board of Supervisors, and further, limit its decision to the invalidity of zMod alone. There is precedent for this remedy, and in fact, **it is what the Residents themselves asked this Court to do**.[1] Failure to do so will leave the *Amici's* members, as well as their lenders and title insurers – all of whom relied in good faith on the approvals granted by various public bodies in the Commonwealth – in an unnecessary state of uncertainty.

INTEREST OF THE AMICUS

The Home Builders Association of Virginia, Inc. ("**HBAV**") is a professional trade association for the single-family and multi-family housing industry in the Commonwealth. Founded in 1956 as the state chapter of the National Association of Home Builders, the HBAV represents the industry before the Virginia General Assembly and numerous state regulatory agencies. The HBAV's membership includes a diverse array of businesses involved in all stages of the land development and construction process, including builders, land developers, architects, engineers, land-use practitioners, remodelers, and other trade partners. In addition to their state advocacy, the HBAV and their 15 affiliated regional associations collaborate with local governments to implement policies that increase the supply of housing available for individuals across the income spectrum.

[1] See, Reply Brief of Appellants in Response to Brief of *Amici Curiae* pp. 11-12 ("**Reply Brief**").

The Virginia Association for Commercial Real Estate ("**VACRE**") is a coalition of over 2,000 commercial real-estate developers, owners, and industry partners in the Northern Virginia, Hampton Roads, and Richmond metropolitan areas. It is comprised of three chapters, NAIOP Northern Virginia, the Greater Richmond Association for Commercial Real Estate, and the Hampton Roads Association for Commercial Real Estate, whose members promote the ownership, development, investment, and use of commercial real estate and its key role in Virginia's economic development. The VACRE advocates before the General Assembly on legislation impacting the industry, particularly matters pertaining to land-use and the development of buildings. Many of its members also build and own mixed-use developments that contain a significant residential component and thus share the interests of the HBAV.

AUTHORITIES AND ARGUMENT

The reasoning underpinning the Court's holding in this case has generated uncertainty and ambiguity for the *Amici's* members and the development community in general. While its immediate effect was the invalidation of zMod, it is reasonable to assume that citizens who previously opposed development projects proposed by *Amici's* members may now claim that the effect of the Court's ruling extends far beyond Fairfax County to every Virginia locality that met virtually without a quorum physically present between the Governor's Declaration of a State of Emergency in

March 2020, and July 1, 2021. This is not a speculative or remote possibility, as shown by the swift response of a prominent advocacy organization, known for its concern over the use of electronic meetings, which immediately seized on this Court's opinion and forthrightly declared that it may "open the door to challenge a lot of decisions taken during the first 15 months of [] the pandemic" and result in a "a massive reckoning" for local governments.[2] The Court can avoid this.

I. While some localities maintained a physical quorum present during the relevant time period, a number of them did not.

While the Court's decision was focused on Fairfax County and its enactment of zMOD, the Court reached that conclusion in substantial part by its ruling on the Residents' third assignment of error, that "the Board had no legal authority to adopt Z-Mod in an electronic meeting that violated the open meeting requirements of VFOIA." Slip. Op. p. 5.[3] The Court held that under Va. Code Ann. § 2.2-3708.2(A)(3), until amended effective July 1, 2021, a public body could only meet

[2] Bruce Potter, *Fairfax County Zoning Revamp Thrown Out by Virginia Supreme Court, Citing Virtual Meeting*. INSIDENOVA, March 23, 2023. https://www.insidenova.com/news/fairfax/fairfax-county-zoning-revamp-thrown-out-by-virginia-supreme-court-citing-virtual-meeting/article_e30cb3aa-c99e-11ed-a679-f356c047f6a7.html; Megan Rhyne, *Was it necessary?* Virginia Coalition for Open Government, March 23, 2023. https://www.opengovva.org/blog/was-it-necessary.

[3] This is, of course, the Slip Opinion in Berry v. Board of Supervisors of Fairfax County, Record No. 211143, decided March 23, 2023, and referenced here as "Slip Op."

virtually, and without a quorum of the body physically present in the same location, for limited purposes. The adoption of a new zoning ordinance, which had undergone substantial revision during a multi-year citizen and stakeholder engagement process, was not among them. Slip Op. p. 14.

Thus, while the Court's ruling may have been focused on the adoption of zMOD, its logic suggests that any decision approving land use projects (or indeed many other public actions) made by any public body that acted virtually in the same manner, is potentially challengeable.

There is no known listing of all Virginia localities that conducted virtual public meetings without a quorum physically present at a single location. There are 95 counties, 38 incorporated cities, and 190 incorporated towns in Virginia, for a total of 323 localities with legislative and land use authority. In Northern Virginia alone, the Cities of Alexandria, Falls Church, and Fairfax, the Towns of Vienna, Herndon, and Clifton, and Arlington County, conducted only virtual meetings prior to July 1, 2021. This practice was not isolated to Northern Virginia. Localities as disparate as Albemarle, Greensville, Greene, and Southampton Counties, and the Cities of Charlottesville, Norfolk, Richmond, and Winchester also conducted virtual meetings during some or all of the relevant period.[4] There were surely others.

[4] Counsel for *Amici* personally verified that these jurisdictions met as reported and acted on matters as noted, by review of minutes and where necessary, of video.

Between March 2020, and July 1, 2021, some or all of these localities considered and approved land use applications, including zoning text amendments, rezonings, special use permits, special exceptions, conditional use permits, proffer condition amendments, comprehensive plan amendments, and waivers. Their Boards of Zoning Appeals approved variances and, where authorized, special permits. Because land development activity very frequently followed on these approvals, the jurisdictions with which the *Amici* have consulted advise that several thousand development permits, such as site plans, land disturbance permits, building permits, and occupancy permits, have been issued in good faith reliance on those approvals.

The *Amici's* members are legally bound to the processes established by each public body for filing, reviewing, and approving land development applications. During the relevant period, applicants adhered to those requirements in good faith, and yet now face significant uncertainty whether the approvals during the relevant period and the permits derived therefrom are valid. Neither they nor the affected localities can be sure those actions were sufficiently essential to the continuity of government, or "required or necessary to continue operations of the public body … and the discharge of its lawful purposes, duties, and responsibilities[,]"[5] or were in

[5] Slip Op. p. 25.

fact to "address the emergency," so as to provide assured relief from the prohibitions on virtual meetings then contained in the VFOIA.[6]

II. The Court's decision has already caused great uncertainty as to the current validity of decisions, particularly in land use matters, that were approved before the July 1, 2021.

The *Amici* advise that developers and builders are in fact uncertain as to the validity or ongoing status of their land use approvals, not only in Fairfax, but in other jurisdictions that met virtually without a physical quorum. They are concerned about

[6] The Court suggested that "[q]uestions regarding . . . meeting statutory deadlines for government action [that] are . . . time-sensitive with a failure to meet such deadlines either imperiling the continued existence of the government or having the potential to cause the County to forever forego acting on a particular topic[]" might conceivably be permissible as matters that implicate continuity of government. Slip Op., p. 26-27.

While the *Amici* submit that such land use decisions are potentially time-sensitive matters necessary for the continuity of government, and certainly for the economy, they also note that unlike the actions cited by the Court in Note 15 of its Opinion they are not necessarily ones where it is clear that "a locality must act within a statutorily defined deadline or lose the ability to act at all." Id. Virginia Code § 15.2-2286(A)(7) provides in pertinent part that "[i]n any county having adopted [a] zoning ordinance, all [rezonings] shall be acted upon and a decision made within such reasonable time as may be necessary which shall not exceed 12 months unless the applicant requests or consents to action beyond such period or unless the applicant withdraws. . . . In the event of and upon such withdrawal, processing of the [rezoning] shall cease without further action as otherwise would be required by this subdivision." This provision, however, does not provide for what happens to an application thereafter, if it has not been withdrawn. Moreover, it does not apply to any city or town. Nor does it apply to special or conditional use permits or special exceptions. Still further, while appeals to a board of zoning appeals are to be decided within ninety days of filing, this Court has held that period to be directory and not mandatory. Tran v. Bd. of Zoning Appeals, 260 Va. 654, 658 (2000).

the status of those approvals. In many cases, applicants have incurred substantial expenses – in the billions of dollars – in good faith reliance on those approvals. If they were issued at a meeting that could be found illegal, then it is possible that all subsequent permitting associated with an approval is tainted.

The *Amici* submit, therefore, that the impact of the Court's decision has been far greater than the Residents indicated. They dismissed the possibility of adverse effects outside of Fairfax County and insisted their claims were pinpoint.[7] As set forth above, however, the sweep of the Court's reasoning has cast a statewide cloud.

III. Amici requests that the Court clarify its ruling as the Residents asked consistently with Perkins v. Cnty. of Albemarle.

In Perkins v. Cnty. of Albemarle, 214 Va. 416 (1973), this Court granted reconsideration of its earlier decision in order to clarify that its ruling applied prospectively to all localities other than Albemarle County. The *Amici* request that the Court fashion a similar remedy here, and furthermore, submit that such remedy should not be controversial given that the Residents themselves sought such a ruling from this Court. In their Reply Brief, the Residents volunteered that Perkins could serve as a roadmap for appropriate relief, stating, "[i]n the event that the Court believes that its ruling here raises similar concerns about an adverse statewide impact

[7] See, e.g., Reply Brief pp. 7-11 ("Residents do not believe that there is likely to be a substantial adverse precedential impact upon other local government actions in the event that the Court should decide in their favor.").

(which Residents believe is extremely unlikely), it could fashion its relief in a similar manner in this case." Id. pp. 11-12.

Despite the Residents' assurances local governments and the *Amici's* industries have been adversely affected, and therefore this is precisely what they seek. Specifically, the *Amici* asks the Court to clarify its ruling as follows:

> 1. As to all public bodies except the Fairfax County Board of Supervisors, the Court's ruling applies prospectively only, and the decision cannot be used to challenge decisions already made by other public bodies prior to the date of the Court's decision.
>
> 2. With respect to the Fairfax County Board of Supervisors, if the Court does not fully reconsider its position,[8] that the Court clarify that its decision only applies to the adoption of zMOD, and does not apply to any other decision that was made by the Board at an electronic meeting prior to July 1, 2021, and most particularly land use decisions.
>
> 3. In addition, because zMOD was the governing ordinance in Fairfax County from March 23, 2021, until this Court's decision two years later, more than one hundred land use applications were approved by the Board pursuant to that Ordinance. Because the Court declared that Ordinance "void ab initio" and therefore never existed,[9] legitimate confusion now exists regarding the approvals based on zMOD, and *Amici* ask that the Court clarify that its decision may not be used to challenge the approval of any rezoning, special exception, variance, proffer condition

[8] *Amici* take no position regarding the Board's arguments with respect to the merits of the Court's interpretation of the relevant Ordinance and statutes.

[9] As this Court has said multiple times, something that is void ab initio means "it was without effect from the moment it came into existence." Kelley v. Stamos, 285 Va. 68, 75 (2013). The Court has further said that such a decision "is a nullity without force or effect and may be collaterally challenged." Id.

> amendment, site or subdivision plan, waiver, or similar approval, or any permits that were issued pursuant to those approvals during that time.

Perkins is not alone in employing such a remedy. In City Council of Alexandria v. Potomac Greens Assocs. P'ship, 245 Va. 371 (1993), the Court held that the Alexandria City Council's failure to provide two notices of a Planning Commission hearing rendered an ordinance void ab initio. During oral argument, the City Council warned of the potential fallout of an adverse ruling because the City had followed the same notice process for all land use cases for over 40 years. Id. at 378. The Court thus said, "[w]e direct, however, that our decision today shall be limited to the present case, shall operate prospectively only, and shall not affect other amendments enacted prior to our decision in this case." Id.

Such a ruling here would eliminate the cloud that now lies over the validity of these actions. Failure to remove that cloud has potentially serious consequences for the *Amici's* members, the operation of local government during the period in question, and other related industries including lenders and title insurers.

Respectfully submitted,

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CERTIFICATE PURSUANT TO RULE 5:26

I hereby certify that Rule 5:26(g) of the Virginia Supreme Court has been complied with and pursuant to that Rule, on April 25, 2023, an electronic version, in Portable Document Format (PDF), was filed with the Clerk of the Supreme Court of Virginia and served on counsel for all parties via e-mail as follows:

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The word count on the foregoing complies with the word limit and contains 2518 words.

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