In The
Supreme Court of Virginia

RECORD NO. 211143

DAVID BERRY, *et al.*,

***Appellants*,**

v.

BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VIRGINIA,

Appellee.

APPELLEE'S PETITION FOR REHEARING

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULE

OTHER AUTHORITIES

APPELLEE'S PETITION FOR REHEARING

Under Rule 5:37, the Board of Supervisors respectfully files this Petition for Rehearing after this Court's Opinion of March 23, 2023. The Board asks the Court to Order supplemental briefing on the issues raised in this Petition and the amicus briefs, and set this appeal back on the docket for oral argument. Alternatively, the Board asks the Court to amend its Opinion and remand the case so the circuit court may determine, based on a complete record, whether the Board properly considered action on the zMOD proposal necessary to continue operations.

I. The Board acted in good faith in holding virtual public meetings on zMOD in March 2021, consistent with the General Assembly's legislative intent and example.

The circumstances at issue bear repeating. In early 2021, the nation was still in the throes of the COVID pandemic, with masking and stay-at-home mandates, hospitalization rates threatening to overwhelm capacity, vaccination controversy, emerging COVID variants, and repeated viral surges. At the time of the Board's public hearing on zMOD, the pandemic had already dragged on with no apparent end in sight for an entire year. Likewise, the duration of the Governor's orders limiting the size of gatherings, among other public health measures, was unknown.

In December 2020, when the Board authorized public hearings on zMOD, the number of people allowed to gather in person had dropped from 250 to 25, a

number soon reduced to 10.[1] By the time of the Board's public hearing in March 2021, the Governor had eliminated any exception for the operation of government.[2] The budget language was a lifeline to Virginia public bodies—allowing them to meet electronically to continue operations while preserving transparency through all the standard VFOIA measures.[3] This option was especially critical in populous jurisdictions like Fairfax County, where the health risks posed by even a permissible in-person meeting would have discouraged many from attending.

The Opinion ventures outside the plain language and four corners of the budget language by referring to the County's continuity ordinance and subsequent state legislative history.[4] But any fair statutory construction considering extrinsic evidence must include the legislative history of the budget language itself.[5]

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[1] *See* Va. Exec. Order No. 67, 5th amended (Nov. 5, 2020); Va. Exec. Order No. 67, 6th amended (Nov. 13, 2020); Va. Exec. Order No. 72 (Dec. 10, 2020). The Board alone has 10 members, before accounting for residents attending the hearing, clerks, staff who broadcast and record each meeting, and many others.

[2] *See* Va. Exec. Order No. 72, 3d amended (Feb. 24, 2021).

[3] Seventy residents testified during the Board's public hearing on zMOD, and it was broadcast live. A video of that hearing was immediately made available for public viewing on demand, and it can still be viewed today.

[4] The Opinion refers to a VFOIA amendment that took effect *after* the hearing on zMOD. *See* Slip Op. at 28 n.19. Subsequent legislative history has been called a "hazardous basis for inferring . . . intent." *United States v. Texas,* 507 U.S. 529, 535 n.4 (1993). It is equally hazardous to those endeavoring to act in good faith reliance on the law as written and understood at the time of the challenged action.

[5] *See Virginian-Am. Water Co. v. Prince William Cnty. Serv. Auth.,* 436 S.E.2d 618, 621 (Va. 1993) (recognizing use of legislative history to resolve

The budget language originated as an amendment proposed by the Governor to the 2020 budget bill—recognizing that the language was in response to the newly exploding COVID pandemic.[6] The Governor explained the proposed budget language now at issue: "This amendment provides authority for public bodies, including agencies, boards, and common interest communities to conduct electronic meetings during a declared state of emergency when it is impracticable or unsafe to assemble a quorum in a single location." Nothing in the explanation suggested an intent to limit this authority to only essential operations.

The same theme was evident in the Senate's floor debate. Senator Richard H. Stuart, then-Chairman of the FOIA Council, observed that the budget language was not perfect. Together with Senator Scott Surovell and Senator Jeremy McPike, Senator Stuart noted his intention to improve upon the language in subsequent iterations, foreshadowing the changes that took effect July 1, 2021.[7] He then stated,

> I know that these local governments and other agencies need the ability to meet and conduct regular business. Not emergency business,

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ambiguity in statute); *Conyers v. Martial Arts World of Richmond, Inc.,* 639 S.E.2d 174, 178 (Va. 2007) (holding that, if a statute is subject to more than one interpretation, courts must apply the one that will carry out the legislative intent). This history was discussed in the Appellee's Brief on page 22, but it is not referenced in the Opinion.

[6] 2020 Va. Governor's Recommendation re HB30, Amend. 137, https://lis.virginia.gov/cgi-bin/legp604.exe?201+amd+HB30AG.

[7] 2020 Va. S. Reconvened Sess. 12:00 m, at 9:55:06–9:55:19 (Stuart); 9:58:20–9:58:58 (Surovell); 10:03:49–10:03:58 (McPike) (April 22, 2020), https://virginia-senate.granicus.com/MediaPlayer.php?view_id=3&clip_id=3292.

> not continuity of government business to keep things running, but the things that our citizens expect them to do like land use cases, like Chesapeake Bay Act cases, there are a multitude of things.[8]

Senator McPike also stated that the budget language was intended to allow "local bodies to begin to meet and get back to some normalcy while still . . . meeting the requirements of FOIA having electronic access."[9] Senator Stuart further noted that the budget language allowed localities to "continue to run their counties—and it's not just local bodies, it's state bodies and other bodies."[10] Senator Adam P. Ebbin elaborated:

> And I know I've gotten calls from constituents who are concerned the Board of Architectural Review can't meet, so how can they do the remodeling of their home before they are scheduled to move in? People who want the Board of Zoning Appeals to meet. Concern that when this finally gets back to normal, that there's going to be such a back-up in work for local government, work for these local commissions, that things are going to be a lot slower than they need to be. So let's, even in these extraordinary times, let's allow government to work the best it can.[11]

No senator expressed an objection to the accuracy of these statements. Thus, "necessary to continue operations" in the budget text simply meant that local governing bodies, among many other public bodies, were explicitly authorized by

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[8] *Id.* at 9:55:27–9:55:52.

[9] *Id.* at 9:50:56–9:51:09.

[10] *Id.* at 9:54:04–9:54:12.

[11] *Id.* at 10:01:10–10:01:47.

the General Assembly to continue their regular work in a virtual forum as long as they continued to adhere to all the required VFOIA transparency measures.[12]

As the Opinion recognizes, the authority under the state budget language was independent of any local continuity ordinance.[13] The continuity ordinance, narrowly framed in a good faith effort not to abuse the relatively vague authority in Virginia Code § 15.2-1413, constrained the scope to business "necessary to assure the continuation of the County's *essential functions and services*." Slip Op. at 20 (emphasis added). The budget language, on the other hand, explicitly authorized virtual meetings "necessary to continue operations" and includes no modifier for "operations." By construing the budget language based on the more restrictive ordinance, the Opinion effectively adds text to the budget language in violation of the legislative intent.[14] This approach would effectively create a patchwork of standards for construing the state budget language according to each locality's individual continuity ordinance. In finding that the Board was still limited to its

[12] It is uncontroverted that the Board implemented all these transparency measures as it heard zMOD.

[13] In fact, the continuity ordinance itself stated that it would give way to any new statutory authority for electronic meetings. J.A. 46, ¶ 4.

[14] *See Appalachian Power Co. v. State Corp. Comm'n*, 733 S.E.2d 250, 256 (Va. 2012) ("Rules of statutory construction prohibit adding language to or deleting language from a statute.").

continuity in government authority under Virginia Code § 15.2-1413, the Opinion also renders the budget language practically meaningless as to local governments.

And here, what better proof is there of the General Assembly's intent than its own conduct under the same authority? The House of Delegates, relying on the budget language,[15] met electronically during its 2020 special session and its first two sessions in 2021. During that time, the House took up all legislation, with no constraint on the matters it considered. Thus, the Board acted within that authority and in the utmost good faith in conducting its own virtual meetings on zMOD.[16]

II. The Opinion renders a final decision on the merits even though the case was decided below on demurrer.

This appeal is from the trial court's decision sustaining the Board's demurrer. A demurrer does not involve evaluating the merits of a claim.[17] Even if

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[15] *See* J.A. 50–55 (Attorney General opinions issued to House Speaker Eileen Filler-Corn and Sen. Richard Saslaw).

[16] The decision as to what was necessary is a matter entrusted to the legislative body, subject not to judicial review but to the control of voters at the ballot box. *See Hamer v. School Bd.,* 393 S.E.2d 623, 627 (Va. 1990); *Bd. of Sup'rs v. Southland Corp.*, 297 S.E.2d 718, 722 (Va. 1982). The adoption and amendment of a zoning ordinance is a quintessential example of a governing body acting in a legislative capacity. *See* Va. Code §§ 15.2-2280, -2285. Yet the Opinion shows no deference to the Board's legislative judgment. *See Ames v. Town of Painter*, 389 S.E.2d 702, 705 (Va. 1990) (recognizing that judicial review of zoning requires "particular circumspection because of the principle of separation of powers").

[17] *See Riverview Farm Assocs. Va. Gen. P'ship v. Bd. of Sup'rs,* 528 S.E.2d 99, 103 (Va. 2000); *Concerned Taxpayers v. Cnty. of Brunswick,* 455 S.E.2d 712, 716 (Va. 1995).

legislative necessity is subject to judicial review, whether zMOD was "necessary" in March 2021 is partly a question of fact.[18] The Court observed, *sua sponte*, that "it is undisputed that the Board did not consider and adopt zMOD to address the COVID-19 emergency." Slip Op. at 15. But while that is not the standard under the budget language, the Opinion deprives the Board of the chance to show its COVID-related and other reasons for proceeding with zMOD.

Evidence—had the Board been permitted to produce it—would show that zMOD was the very ordinance that the moment required. The Opinion concludes that zMOD was not necessary, because it replaced a 43-year-old ordinance and had taken years to develop. Slip Op. at 17, 21. But the proceedings below ended on demurrer, with the Board never having received an evidentiary hearing to vindicate its legislative judgment. Indeed, the immensity of the zMOD project—involving a complex ordinance that had been carefully reworked with extensive public input—demonstrates the need to move forward. ZMOD was an essential part of the Board's efforts—across many areas of County government, not simply in the zoning arena—to shepherd its residents and businesses through an unprecedented pandemic. Though the pandemic's actual and potential effects were well known to the Board when it acted on zMOD, those facts are not before the Court at this

[18] *See Gilbane Bldg. Co. v. Fed. Rsrv. Bank,* 80 F.3d 895, 905 (4th Cir. 1996) (observing that for mixed issues of law and fact, only issues of law are reviewed *de novo*).

premature stage. The Opinion clearly does not resolve this case on the best and narrowest grounds available.[19]

III. Voiding zMOD casts doubt on years of pandemic-era decisions made in good faith reliance on the budget language.

If zMOD was adopted in violation of VFOIA, the Residents would be entitled to a declaratory judgment as a remedy.[20] But nothing compels the conclusion that zMOD was void *ab initio*. Virginia Code § 2.2-3710 prohibits the taking of votes in violation of the statute; it is silent as to the remedy for such a violation. Similarly, Virginia Code § 2.2-3700 provides only for invalidating an ordinance that itself conflicts with the provisions of VFOIA—*not* an ordinance that was adopted *in a manner* that conflicts with VFOIA.[21] Although Virginia Code § 2.2-3714 sets forth fines for VFOIA violations, those fines are imposed only when the actions of local officials were "willfully and knowingly made."

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[19] *See Levick v. MacDougall*, 805 S.E.2d 775, 786 (Va. 2017).

[20] The Opinion correctly observes that the Board conceded this point during oral argument. Slip Op. at 29 n.20. But the Board did not concede that the appropriate or only remedy would be to declare zMOD void *ab initio*. Jan. 10, 2023, Oral Argument at 28:40, https://www.vacourts.gov/courts/scv/oral_arguments/2023/jan/home.html. In light of the procedural posture of this appeal, it was reasonable to expect that any discussion about a specific remedy would occur on remand to the trial court.

[21] *Accord* Op. Va. Att'y Gen. AO-08-08 (Oct. 16, 2008).

Rather, deeming ordinances passed in violation of VFOIA as void *ab initio* is a judicially crafted remedy—one that is increasingly disfavored.[22] In awarding such relief, this Court has applied it prospectively, particularly when the result of deeming an ordinance void *ab initio* would significantly upset the status quo.[23]

That same analysis is apt here. The Opinion has cast a shadow over almost two years of zoning actions. And the ruling isn't limited to zMOD or zoning: every public body in the Commonwealth that met electronically during the pandemic will be forced to examine its actions and speculate whether this Court would deem them "time-sensitive." Slip Op. at 27. In Fairfax County, this Court's decision affects hundreds of legislative approvals by the Board of Supervisors or the Board

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[22] *See Edwards v. Allen,* 216 S.W.3d 278, 291 (Tenn. 2007) (observing that the "modern trend is to find that the void *ab initio* approach fails when there has been reliance on an ordinance that has given rise to vested rights"). Even as far back as 1940, the United States Supreme Court also observed that "the past cannot always be erased by a new judicial declaration" and that the "principle of absolute retroactive invalidity cannot be justified." *Chicot Cnty. Drainage Dist. v. Baxter State Bank,* 308 U.S. 371, 319 (1940).

[23] *See City Council v. Potomac Greens Assocs. P'ship*, 429 S.E.2d 225, 229 (Va. 1993) (prospectively applying a decision that invalidated a locality's longstanding process by which it had enacted its zoning amendments); *see also Bd. of Sup'rs v. Rowe,* 216 S.E.2d 199, 215 (Va. 1975) (prospectively invalidating a zoning ordinance); *Perkins v. Albemarle Cnty.*, 200 S.E.2d 566, 568 (Va. 1973) (declaring widely practiced taxation methodology unconstitutional but applying ruling prospectively to non-party localities). *But see Matthews v. Bd. of Zoning Appeals,* 237 S.E.2d 128, 136 (Va. 1977) (declining to provide prospective application, because the invalidation of the zoning ordinance merely returned property to its prior zoning status).

of Zoning Appeals and thousands of other administrative decisions.[24] No doubt many affected landowners have entered into contracts and incurred significant costs in reliance on their zoning approvals—to say nothing of the consequences to their ability to secure lending or obtain title insurance. Those owners acted in good faith under zMOD and had no role or voice in this case.[25] They should not be prejudiced by circumstances beyond their control.

Nor is there any showing that the Board willfully and knowingly violated VFOIA's open meeting requirements. The Board intended only to continue its operations in the safest manner that it believed in good faith to be lawful. Reinforcing this point, the Board's zMOD hearing occurred with the express permission of the trial court. If these circumstances compel any remedy beyond a declaratory judgment, it should be prospective only.

CONCLUSION

For these reasons, the Court should grant this Petition for Rehearing.

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[24] All of these zoning decisions occurred after the amendments to Virginia Code § 2.2-3708.2 took effect on July 1, 2021. *See* 2021 Va. Spec. Sess. I Acts ch. 490. Thus, each one occurred during a public meeting that, but for this Court's Opinion, would be free of any resulting cloud.

[25] In their reply to the prior amicus brief, the Residents argued that the relief they sought was "narrow"—voiding only the new zoning ordinance—and that the Court could fashion a prospective remedy to avoid significant adverse consequences. Reply Br. Appellants to Amici at 10–12. This Court's Opinion goes further than even the Residents sought.

Respectfully submitted,

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CERTIFICATE

I certify that, in accordance with Rule 5:1B, on April 19, 2023, an electronic copy of this Petition for Rehearing was filed with the Clerk of the Supreme Court of Virginia, via VACES, and one copy was served, via electronic mail, on:

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Pursuant to Rule 5:37(d) Appellee hereby certifies that the Petition itself is 10 pages in length, excluding cover, tables and certificates.

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