



# FAIRFAX COUNTY

## PROPOSED ZONING ORDINANCE AMENDMENT

### STAFF REPORT

## Readoption of the Zoning Ordinance as Amended through March 22, 2023

**April 14, 2023**

#### Hearing Dates

Planning Commission: May 3, 2023

Board of Supervisors: May 9, 2023, 4:30 p.m.

#### Staff Contacts

Carmen Bishop, Deputy Zoning Administrator

Casey Judge, Principal Planner



Americans with Disabilities Act (ADA): Reasonable accommodation is available upon 48 hours advance notice. For additional information on ADA call 703-324-1334 or TTY 711 (Virginia Relay Center).



PLANNING & DEVELOPMENT

Zoning Administration Division  
Government Center Parkway, Suite 807  
Fairfax, Virginia 22035-5507  
Phone 703-324-1314

[www.fairfaxcounty.gov/planning-development](http://www.fairfaxcounty.gov/planning-development)

## Background

On March 23, 2023, the Supreme Court of Virginia issued an opinion in *Berry v. Board of Supervisors* (Record No. 211143) reversing the Fairfax County Circuit Court and finding the County's 2021 Zoning Ordinance, adopted in March 2021 and commonly referred to as zMOD, void *ab initio*. According to the Supreme Court's opinion, the Board of Supervisors (Board) erred in relying on state legislation, adopted at the outset of the COVID-19 pandemic in 2020, that expanded the ability of public bodies statewide (including the General Assembly) to conduct business via electronic meetings. For meetings that met its requirements, the 2020 legislation overrode conflicting open meeting provisions of the Virginia Freedom of Information Act (VFOIA). The Board indisputably met all the legislation's requirements regarding public notice, access, and comment for an electronic meeting. But the Supreme Court interpreted the legislation narrowly to exclude consideration and adoption of zMOD. If the Board's 2021 adoption of the zMOD Ordinance was void, so was the contemporaneous repeal of the 1978 Zoning Ordinance (as amended), leaving that earlier Ordinance still in effect.

As a result, new public hearings are required for reconsideration of the zMOD Ordinance as previously adopted on March 23, 2021. And while subsequent Zoning Ordinance amendments are not addressed in the opinion, staff recommends that they be included as part of the complete Zoning Ordinance being considered. The Planning Commission public hearing is scheduled for May 3, 2023, and the Board public hearing is scheduled for May 9, 2023 (if the Planning Commission has reported its recommendations).

## Proposed Changes

A [Summary of Notable Changes](#) was originally published April 6, 2021, to highlight the notable changes found in the adopted zMOD Ordinance as compared to the previous 1978 Ordinance. This document has been updated to provide information on the project background, a summary of the structure of the new Ordinance, an overview of the outreach and engagement efforts, and notable changes from seven subsequent Zoning Ordinance amendments adopted by the Board.

The proposed Zoning Ordinance is as provided in the link below

<https://online.encodeplus.com/regs/fairfaxcounty-va/doc-viewer.aspx>, except with the following proposed revisions:

- Replace July 1, 2021, with the new effective date of the Ordinance in:
  - Section 1107 – Effective Date
  - Subsection 4102.5.R(2) – Commercial Recreation, Indoor
  - Subsection 4102.5.W – Health and Exercise Facility, Large
  - Subsections 4102.6.A.(2)(a), (3)(a) – Data Center
  - Subsection 4102.6.B(3) – Goods Distribution Hub
  - Subsection 4102.7.B(4) – Accessory Living Unit
  - Subsection 5100.2.L(3) – Lots with Pipestem Driveways

- Table 8102.1 – Fee Schedule: Special Exception for Addition to or Replacement of a Single-Family Detached Dwelling Existing as of (*insert effective date*), in a Floodplain
- Delete subsections 8101.3.E(1)(d) and (e), which require submission of documentation for the age or disability of a resident with an application for a special permit for an accessory living unit. This edit is for consistency because the age or disability requirement was previously removed from the use standards as part of zMOD.
- In Appendix 1 (not part of the codified Zoning Ordinance), one or more instances of July 1, 2021, may be replaced with the new effective date of the Ordinance.

### Summary

The proposed Zoning Ordinance does not include new content outside of what was previously considered and approved by the Board, except as noted above.

The current situation has created a great deal of confusion for previously approved and in-process applications, so time is of the essence in mitigating that uncertainty. Adoption of the proposed Zoning Ordinance that was in use prior to the *Berry* opinion will allow the most efficient and expeditious resolution of concerns. Therefore, staff recommends readoption of the Zoning Ordinance adopted on March 23, 2021, as amended through March 22, 2023, with the additional revisions noted above. It is recommended that the Ordinance become effective at 12:01 a.m. on the day following adoption.