LAW OFFICES OF
SUE A. GREER

p. 301.934.7988 | f. 301.934.7989 | suegreerlaw.com

August 9, 2024

VIA ELECTRONIC SUBMITTAL

Rueben B. Collins, President
Charles County Commissioners
200 Baltimore Street
La Plata Maryland 20646

Re: Bill No. 2024-06; ZTA 22-174; Mixed Use (MX) Zone Revision to §§297-106 and 297-49

Dear Commissioner Collins:

Chestnut Hill Land, LLC would like to thank the County Commissioners for the opportunity to supplement the record and to respond to the Commissioners requests for additional information. The proposed ZTA modifies the MX Zone regulations, a Planned Development Zone, to promote and incentivize housing for specific populations which will better serve and meet the needs of Charles County.

A. Bill No. 2024-06; ZTA 22-174 does not violate the Fair Housing Act

Bill 2024-06/ZTA 22-174 proposes an amendment to the text of the Charles County Zoning Ordinance, § 297-447, relating to the required percentages of Residential versus Commercial development in the MX Zone. The proposed amendment would allow for the substitution of additional Residential housing units in place of Commercial units if the residential housing is for a specific population such as :

(1) Affordable housing units,
(2) Accessory dwelling units to single-family units,
(3) Artist housing/studio,
(4) Live-work units,
(5) Age-restricted housing, or
(6) Housing for veterans.

(collectively the "Eligible Housing Categories"). Applicant has been asked by the Board of Charles County Commissioners ("BOCC") to provide an overview regarding the legality of prioritizing

these particular Eligible Housing Categories in the context of the Fair Housing Act, 42 U.S.C.A. § 3601 *et seq.* (the "FHA").

The FHA is understood to prohibit discrimination in the rental or sale of a dwelling on the basis of race, color, religion, sex, familial status, or national origin. *Dews v. Town of Sunnyvale, Tex.*, 109 F. Supp. 2d 526, 530–31 (N.D. Tex. 2000); FHA § 3604(a). Relevant to the inquiry here, the FHA applies to local government bodies, such as the BOCC, by prohibiting them from using their zoning powers to exclude housing for a group of people in one of these aforementioned classes. *NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir.), aff'd 488 U.S. 15, 109 S.Ct. 276, 102 L.Ed.2d 180 (1988). To establish a claim under the FHA, a party must show that a local zoning body's action either (1) intentionally discriminated against one of the FHA's protected classes, or that the action (2) disproportionately impacted one of the protected classes.

With regard to claims for intentional discrimination, if the evidence, when viewed as a whole, indicates that a decision or regulation was not motivated, by race, color, religion, sex, familial status, or national origin, a claim for intentional discrimination will not stand. *Simms v. First Gibraltar Bank*, 83 F.3d 1546, 1556 (5th Cir. 1996). None of the Eligible Housing Categories identified in ZTA 22-174 directly implicate race, color, religion, sex, familial status, or national origin. Therefore ZTA 22-174 cannot give rise to a claim of intentional discrimination under the FHA. 42 U.S.C.A. § 3607(b) exempts restrictions implemented by a local zoning body relating to the maximum number of occupants permitted to occupy a residential dwelling unit.

With regard to disparate impact claims, which often involve presentation of statistical evidence, a plaintiff must first demonstrate "a robust causal connection between the defendant's challenged policy and the disparate impact on the protected class." *Reyes v. Waples Mobile Home Park Ltd. P'ship*, 903 F.3d 415, 424 (4th Cir. 2018). This robust casual connection, according to the United States Supreme Court, is required to ensure that:

> [r]acial imbalance ... does not, without more, establish a prima facie case of disparate impact and thus protects defendants from being held liable for racial disparities they did not create. Without adequate safeguards at the prima facie stage, disparate-impact liability might cause race to be used and considered in a pervasive way and 'would almost inexorably lead' governmental or private entities to use "numerical quotas," and serious constitutional questions then could arise.

Texas Dep't of Housing & Cmty. Affs. v. Inclusive Communities Project, Inc., 576 U.S 519, 542 (2015). If this "robust" causal connection is not established, the claim must be dismissed. *Id.* However, even if the required connection is established, the local zoning body will still defeat a claim for disparate impact by showing that its law or policy serves a valid interest. *Id.* at 541. (*See also Reyes*, 903 F.3d at 424). Moreover, the Supreme Court in *Texas Dep't of Housing* ruled that:

> Disparate-impact liability mandates the removal of artificial, arbitrary, and unnecessary barriers, not the displacement of valid governmental policies. **The FHA is not an instrument to force housing authorities to reorder their priorities**. Rather, the FHA aims to ensure that those priorities can be achieved without arbitrarily creating discriminatory effects or perpetuating segregation.
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> The FHA does not decree a particular vision of urban development; and **it does not put housing authorities and private developers in a double bind of liability, subject to suit whether they choose to rejuvenate a city core or to promote new low-income housing in suburban communities**. As HUD itself recognized in its recent rulemaking, disparate-impact liability does not mandate that affordable housing be located in neighborhoods with any particular characteristic. 78 Fed.Reg. 11476.

Id. at 540, 542 (emphasis added). Therefore, the BOCC should not be concerned if it exercises its discretion to grant an application for the substitution of residential units falling under one of the Eligible Housing Categories, while denying another developer's application.

As set forth below, each of the Eligible Housing Categories contained in ZTA 22-174 are either specifically exempted from the provisions of the FHA, or are not governed by the FHA

(1) **Affordable housing units**. As indicated above, tenants of "low income housing" are not eligible for protection under the FHA because this group of people is not defined by their race, color, religion, sex, familial status, or national origin. As held in *Nernberg v. Borough of Sharpsburg, Pa.*, 2015 WL 1651011, at *5 (W.D. Pa. 2015), "[t]enants of low income housing" are not one of the groups protected under the FHA. *Id.*

Furthermore, as held by the United States Supreme Court, a local zoning body's decision to implement affordable housing programs is discretionary, and does not put a zoning body in a "double bind of liability" where it will be subject to suit depending on where or when it decides to develop affordable housing. *Texas Dep't of Hous.*, 576 U.S. at 542 (2015).

(2) **Accessory dwelling units to single-family units**. Accessory dwelling units ("ADUs"), which are often, but not necessarily, separate structures to a primary single family home that can be rented out by an owner, are considered inclusionary structures because they provide for additional housing opportunities. The allowance of ADUs is broadly supported by the Department of Housing and Urban Development, affordable housing advocates, and disability rights advocates because "it typically serves adult children, the elderly (including in-laws), and persons with disabilities, as well as low-income people and smaller households." ACCESSORY UNITS, American Bar Assoc., Guide to Affordable Housing

Development, Chapter 5, Section V. Therefore, allowing the substitution of accessory dwelling units in place of commercial units in the MX Zone is consistent with principals of social justice that the FHA seeks to foster.

(3) **Artist housing/studio**. No reported case can be located discussing any effect the FHA may have on the provision, or lack thereof, of artist studio housing. Like the other Eligible Housing Categories identified in ZTA 22-174, this specific category does not implicate any of the groups of people that the FHA seeks to protect from discrimination. Therefore, ZTA 22-174's inclusion of housing with an art studio does not raise give rise to a claim for direct discrimination. With regard to disparate impact claims, a plaintiff cannot use a solitary zoning decision adverse to oneself as evidence:

> if plaintiffs could proceed under a disparate impact theory challenging solitary zoning decision nearly every zoning denial would be a source of potential liability. **Every denial would by definition impact the group of people applying and not other groups, so that disparate impact on a protected class could always be shown** if most of the proposed residents, customers or owners shared some protected characteristic. **That was never the intended purpose of the FHA**, ADA or Rehabilitation Act.

Nikolich v. Vill. of Arlington Heights, Ill., 870 F. Supp. 2d 556, 564 (N.D. Ill. 2012) (emphasis added). *See also Reg'l Econ. Cmty. Action Program, Inc. v. City of Middletown*, 294 F.3d 35, 53 (2d Cir. 2002) (holding that the denial of a special use permit a single act that cannot establish a claim for disparate impact.); *Avenue 6E Invs., LLC v. City of Yuma, Arizona*, 2018 WL 582314, at *7 (D. Ariz. 2018); *AHF Cmty. Dev., LLC v. City of Dallas*, 633 F. Supp. 2d 287, 304 (N.D. Tex. 2009) Therefore, an individualized denial of an application to substitute a particular form of housing cannot be used to support a claim for disparate impact. There must instead be statistical evidence, over multiple applications of the disputed law or policy, demonstrating a link to a disparate impact upon a protected class identified in the FHA. *Id.*

(4) **Live-work units**. No reported case can be located discussing any effect the FHA may have on the provision, or lack thereof, of live-work housing units. Like the other Eligible Housing Categories identified in ZTA 22-174, this specific category does not implicate any of the groups of people that the FHA seeks to protect from discrimination. Therefore, ZTA 22-174's inclusion of live-work unit housing does not raise give rise to a claim for intentional discrimination under the FHA. With regard to disparate impact, the same analysis for Artist Housing/Studio applies.

(5) **Age-restricted housing**. Under FHA § 3607(b)(2), housing developments intended for persons over the age of 55 are explicitly exempted from the FHA's provisions if:

(i) at least 80 percent of the occupied units are occupied by at least one person who is 55 years of age or older;
(ii) the housing facility or community publishes and adheres to policies and procedures that demonstrate the intent required under this subparagraph; and

(iii) the housing facility or community complies with rules issued by the Secretary for verification of occupancy, which shall--
(I) provide for verification by reliable surveys and affidavits; and
(II) include examples of the types of policies and procedures relevant to a determination of compliance with the requirement of clause (ii). Such surveys and affidavits shall be admissible in administrative and judicial proceedings for the purposes of such verification.

Therefore, the inclusion of age related restrictions on the occupancy of residential housing in ZTA 22-174 cannot run afoul of the FHA if the above provisions of the exemption contained in § 3607(b)(2) are satisfied.

(6) **Housing for veterans**. Preferences relating to military veterans are well entrenched in the United States, and presumed to be constitutional as long as they retain a rational basis. *Koelfgen v. Jackson*, 355 F. Supp. 243, 251 (D. Minn. 1972), aff'd, 410 U.S. 976, 93 S. Ct. 1502, 36 L. Ed. 2d 173 (1973). *See also* 5 U.S.C.A § 2108(1) and 3309 regarding preferences points given to veterans for civil service examinations. Specifically, the rationality for such legislation is that veterans are owed a debt of gratitude, and because veterans are often in need of housing due to the disruption that military service has imposed upon their normal life. Again, this particular Eligible Housing Category does not invoke any of the protected classes under the FHA, and any disparate impact it may have upon one of the protected classes is countered by the rational basis for such laws.

B. Existing County Zoning Regulations do not provide the flexibility needed to incentive housing for specific populations, necessitating the need for a Zoning Text Amendment

Base zoning requirements are rigid and do not provide much flexibility in designing communities to meet the need of specific County needs. Recognizing the need for greater flexibility, the County adopted Planned Development Zones *aka* overlay zones:

(1) To encourage innovative and creative design of residential, commercial and industrial development; and

(2) To provide a broad range of housing and economic opportunities to present and future residents of the County consistent with the Charles County Comprehensive Plan.

See Article VII Planned Development Zone Regulations, §297-101 Objectives

Planned Development Zoned projects achieve greater flexibility of design via a Design Code or Alternative Design Code which may vary from the County base zone requirements. Bill No. 2024-06/ ZTA 22-174 provides the County the ability to meet the needs of specific populations, such as artists, special needs populations, veterans, affordable housing or age-restricted housing within the Planned Development Zone process.

To temper such flexibility and ensure both quality of development and the needs of the County are met, the County's Code requires an Applicant to submit both a Master Plan and Design Code. The Commissioners have the ultimate review and approval of these guiding documents.

The Master Plan submission includes the information necessary to evaluate the proposal which includes, but is not limited to, an explanation of the Project's relationship with the Comprehensive Plan, a preliminary analysis of the impacts of the Project and the any measures proposed to mitigate such impact, a statement of density and/or intensity; a graphic showing the generalized boundaries and areas of the designated uses, architectural elevations and sketches of typical structures, recreation areas, and landscaping, the proposed major circulation system and an explanations of how the Project will meet superior design requirements set forth in the Code. The Design Code is required to include "the overall planned development design concept; standards for street, block and lot layouts; streetscape design standards; building and lot design and development standards; landscape standards for public and private spaces; and architectural design standards" *See §297-209, Design Guidelines and Requirements.* The Master Plan and the Design Code are reviewed and approved the County Commissioners as part of the overlay zone approval process. Prior to Commissioner review, both documents also receive staff and Planning Commission scrutiny.

C. The Master Plan and Design Code approval process ensures the provision of amenities and services necessary to serve an MX zoned project

The objective of providing flexibility of design for Planned Development Zoned projects is to incentivize superior design that benefit the development or the surrounding neighborhood, or the public in general, to a greater extent than would likely result from development of the site under a Base Zone. The Commissioners are able to ensure the appropriate scale and provision of amenities and other services (to include benchmarks and metrics) during the Planned Development Zone approval process.

This authority exists in §297-102 (C)(4), which authorizes the Commissioners to add conditions to the zoning approval, which may include insuring benefits that are measurable and able to be completed or arranged prior to completion of the development. The Commissioners are the final the authority on the approval or denial of an MX Zone or other Planned Development Zone.

D. Consideration of the surroundings of a proposed MX zone/project is appropriate when evaluating whether the proposed MX zone/project should be approved

Generally, the purpose of the MX Zone is to enable, "planned projects which will successfully integrate residential, commercial, industrial and institutional uses into a master-planned development." It is reasonable to consider the presence of proximate uses as integral to a proposed development. And, supporting the required compatibility finding set forth in §297-104(A), there is already a requirement *(§297-106B)* that provides, "In addition to the buffer yard requirements of Article XXIII, *uses and structures located near the periphery of an MX Zone shall be compatible with existing and planned uses in the surrounding area adjacent to the gross tract boundary* [emphasis added] and provide adequate transition in intensity and building type." The structure of the existing Ordinance already requires consideration of a proposed project's surrounding context.

Furthermore, the existing language of the Zone's regulations, already does not require the entirety of the use list cited in the basic purpose of the MX Zone to be present in a MX development. For example, industrial uses are not a requirement but are instead an available substitution for some or all of the commercial use component of the mix.

That having been said, the Applicant has consistently advocated that it is appropriate to consider the surroundings of the proposed MX project in evaluating whether that proposed MX project should be approved. If the Commissioners determine there is a need to be more specific regarding the permissibility of considering neighboring uses in the approval of a MX Zone, a new clause §297-106 (G) could be added, stating:

> **G. In approving an application for the MX Zone, the County Commissioners may make the required finding of §297-104A that an application achieves the purpose of the MX Zone to successfully integrate residential, commercial (or industrial), and institutional uses if there are existing or planned uses located near the periphery of the proposed MX Zone which, together with the proposed development within the proposed MX Zone, will create a combined neighborhood with integrated residential, commercial (or industrial), and institutional uses.**

Chestnut Hill Land is pleased to have the opportunity to present a text amendment that provides an enhanced product that better serves the community and community needs. Thank you again for the opportunity to comment.

Respectfully Submitted,

LAW OFFICES OF SUE A. GREER, P.C.

Sue A. Greer

MCNAMEE HOSEA, P.A.

Matthew C. Tedesco

SAG/ksg
cc: file