



February 1, 2023

Honorable Christian Dorsey, Chair  
Arlington County Board  
2100 Clarendon Boulevard, Suite 300  
Arlington, VA 22201

**Re: Inequity and Illegality in Restrictions to the Missing Middle Housing Proposal**

Dear Chair Dorsey,

The NAACP Arlington Branch (the “NAACP”) was stunned and deeply disappointed by the County Board’s recent decision to restrict the Missing Middle Housing proposal in ways that would deny attainable homes to people of color as compared to their white counterparts. On January 25, the County Board voted to advertise amendments to the Zoning Ordinance and General Land Use Plan that would legalize some forms of missing middle housing, but only after striking any option for dwellings of more than six homes and adding an option to limit dwellings of more than four homes to large lots. The NAACP fiercely opposes these restrictions and urges the County Board to enact only the set of options that will supply our community with the highest number of attainable homes across all of Arlington’s residential neighborhoods.

The Board’s removal of options for eight-plexes will result in fewer attainable homes and unequal housing opportunities in the same neighborhoods from which people of color have long been historically excluded. This is of the utmost concern to us as we believe it violates federal law. Some homes in six-plex developments are less attainable as compared to those in the eight-plexes that could have been developed otherwise. The county staff’s analysis shows that the lots most suitable for potential eight-plexes tend to be located among Arlington’s whitest and wealthiest neighborhoods.<sup>1</sup>

**The Arlington County Board imposed these restrictions despite knowing that they would disproportionately exclude and disparately impact people of color.**

Many more attainable homes will be denied if the Board adopts its newly-added option to impose high lot size minimums for five-plexes and six-plexes outside of major transit corridors. This option would significantly reduce the number of attainable missing middle homes on lots in predominantly white neighborhoods, while continuing the practice of concentrating attainable housing in other, more diverse neighborhoods.

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<sup>1</sup> See Arlington County Staff, *Report on County Board Agenda Item #33 - Meeting of January 21, 2023*, at 69 attach. 6 (Jan. 13, 2023), available at [https://arlington.granicus.com/MetaViewer.php?view\\_id=2&clip\\_id=4191&meta\\_id=215699](https://arlington.granicus.com/MetaViewer.php?view_id=2&clip_id=4191&meta_id=215699).

Contrary to its resolution “to ensure that our actions and policies implement the County’s vision in an equitable way,”<sup>2</sup> the Board restricted the number of attainable homes that can be built in the county’s whitest neighborhoods, despite their ample street parking capacity and their outsized share of large lots that can support higher-density dwellings. The County’s own analyses illustrate how these restrictions severely limit housing access to people of color. According to the county staff’s presentation on the Phase 2 framework, a household needs an income of at least \$124,000 to \$160,000 to afford a home in a four-plex, but \$108,000 to \$118,000 to afford a home in a six-plex or eight-plex.<sup>3</sup> The 2020 ACS survey estimates presented by county staff show that 1,505 Black households, 1,950 Latino households, and 1,563 multiracial households in Arlington have incomes between \$100,000 and \$149,999.<sup>4</sup> Homes in a six-plex or eight-plex would be much more attainable to these households of color, but it would be adversely more difficult (if not impossible) for these protected classes to afford homes in a four-plex.

**The County Board’s actions to restrict the missing middle housing proposal put the County on a dangerous path to violate federal and state fair housing laws.** Title VIII of the Civil Rights Act of 1968, also called the Fair Housing Act, makes it illegal to “make unavailable or deny a dwelling to any person because of race, color, religion, sex, familial status, or national origin.”<sup>5</sup> The Virginia Fair Housing Law contains nearly identical prohibitions.<sup>6</sup> Courts have widely recognized that the Fair Housing Act prohibits localities from imposing land use policies that have significant, unjustified disparate impacts on people of color, **regardless of intent.**<sup>7</sup> As the Supreme Court of the United States explained in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*:

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<sup>2</sup> Arlington County Board, *Equity Resolution* (adopted Sept. 21, 2019), available at <https://www.arlingtonva.us/files/sharedassets/public/county-board/documents/resolutions/equity-resolution-final-09-21-19.pdf>.

<sup>3</sup> Arlington County Staff, *Missing Middle Housing Study: Expanding Housing Choice - Phase 2 Analysis and Draft Framework*, at 20 (May 2, 2022), available at [https://www.arlingtonva.us/files/sharedassets/public/housing/documents/missing-middle/mmhs-phase-2-public-presentation\\_05.02.pdf](https://www.arlingtonva.us/files/sharedassets/public/housing/documents/missing-middle/mmhs-phase-2-public-presentation_05.02.pdf).

<sup>4</sup> Arlington County Staff, *Demographics by Race/Ethnicity*, at 8 (May 12, 2022), available at [https://www.arlingtonva.us/files/sharedassets/public/projects/documents/data-and-research/race-and-ethnicity-dashboard/2020raceethnicitydash\\_datasheet\\_5\\_12\\_22.pdf](https://www.arlingtonva.us/files/sharedassets/public/projects/documents/data-and-research/race-and-ethnicity-dashboard/2020raceethnicitydash_datasheet_5_12_22.pdf).

<sup>5</sup> 42 U.S.C. § 3604(a) (cleaned up).

<sup>6</sup> See Va. Code § 36-96.3(A)(1) (“It shall be an unlawful discriminatory housing practice for any person to . . . Refuse to sell or rent after the making of a bona fide offer or refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, national origin, sex, elderliness, source of funds, familial status, sexual orientation, gender identity, or military status[.]”)

<sup>7</sup> See, e.g., *Mhany Mgmt., Inc. v. Cnty. of Nassau*, 819 F.3d 581, 619 (2d Cir. 2016) (noting that “zoning laws or ordinances prohibiting construction of multi-family dwellings have been found in violation of the FHA”), cited in *Reyes v. Waples Mobile Home Park Ltd. P’ship*, 903 F.3d 415, 427, 430 (4th Cir. 2018) (observing that “determining whether a plaintiff made a prima facie case of disparate-impact liability requires courts to look at whether a protected class is disproportionately affected by a challenged policy”) (emphasis in original).

The FHA, like Title VII and the ADEA, was enacted to eradicate discriminatory practices within a sector of our Nation’s economy. These unlawful practices include zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification. Suits targeting such practices reside at the heartland of disparate-impact liability.<sup>8</sup>

The Board’s restrictions disparately impact protected households in two ways.<sup>9</sup> First, the restrictions would cause significant and disproportionate harm to Black and Latino households as compared to white households in Arlington.<sup>10</sup> Raising the affordability threshold for new missing middle homes from \$100,000 to \$150,000 would still allow 44% of white households in Arlington to afford those homes, but only 20.3% of Black households and 24.3% of Latino households.<sup>11</sup> The impact of this exclusionary effect would be more adverse for Black households (a 43% decrease) and Latino households (a 38% decrease) than white households (a 32% decrease). Second, the restrictions would “perpetuate segregation and thereby prevent interracial association in the entire community involved.”<sup>12</sup> County staff have acknowledged that “[r]estrictive zoning that prioritizes low-density development at the exclusion of other types of housing ... contributes to segregation by limiting the housing options for households with lower incomes, overrepresented by People of Color.”<sup>13</sup> Capping density at four-plexes across thousands of parcels would further impede the integration of Arlington’s racially stratified neighborhoods.<sup>14</sup>

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<sup>8</sup> 576 U.S. 519, 539–40 (2015) (cleaned up).

<sup>9</sup> See *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 937 (2d Cir. 1988) (“The discriminatory effect of a rule arises in two contexts: adverse impact on a particular minority group and harm to the community generally by the perpetuation of segregation.”).

<sup>10</sup> See *Reyes*, 903 F.3d at 427 (recognizing a “specific rezoning policy” can have a disparate impact when it “disproportionately decrease[s] the availability of housing for minorities as compared to whites”); *Mhany Management*, 819 F.3d at 607 (crediting “evidence that the original R–M proposal would have created a pool of potential renters with a significantly larger percentage of minority households than the pool of potential renters for the zoning proposal ultimately adopted as law by Garden City”); *Dews v. Town of Sunnyvale, Tex.*, 109 F. Supp. 2d 526, 565 (N.D. Tex. 2000) (concluding that a locality’s “ban on apartments places a disproportionate harm on African–Americans” because “apartments are disproportionately used by African–American households in Dallas County as compared to white households”).

<sup>11</sup> See *Demographics by Race/Ethnicity, supra*, at 8.

<sup>12</sup> *Edwards v. Johnston Cnty. Health Dep’t*, 885 F.2d 1215, 1223 (4th Cir. 1989) (cleaned up) (citing *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983, 987 n.3 (4th Cir. 1984) (explaining that “if a policy perpetuates segregation and thereby prevents interracial association, it will be considered invidious under the Fair Housing Act notwithstanding the fact that it may have no immediate impact”)).

<sup>13</sup> Arlington County Staff, *Arlington’s Race and Ethnicity Dashboard - 2022 Briefing Report*, at 4–5 (May 16, 2022), available at [https://www.arlingtonva.us/files/sharedassets/public/projects/documents/data-and-research/race-and-ethnicity-dashboard/2022-brief-arlington-race-and-ethnicity-dashboard\\_5-16-22.pdf](https://www.arlingtonva.us/files/sharedassets/public/projects/documents/data-and-research/race-and-ethnicity-dashboard/2022-brief-arlington-race-and-ethnicity-dashboard_5-16-22.pdf) (adding that “[t]he map from the Missing Middle Housing Study shows that areas of Arlington zoned primarily for single-family detached housing often overlap with Census Tracts where at least 70% of the population is White”).

<sup>14</sup> See *Town of Huntington*, 844 F.2d at 938 (finding “discriminatory effect” from “the disproportionate harm to blacks and the segregative impact on the entire community resulting from the refusal to rezone”); *Town of*

The Board’s restrictions also threaten to violate the Fair Housing Act’s prohibition on disparate treatment of protected classes, as public statements surrounding those actions indicate explicit discriminatory intent.<sup>15</sup> County staff have already acknowledged the racist history and segregative effects of Arlington’s zoning laws, which remain largely unchanged since their adoption over eighty years ago.<sup>16</sup> A major driver of segregation has been the perpetuation of “rental deserts” in residential neighborhoods.<sup>17</sup> County’s staff’s recent equity analysis of the missing middle housing proposal shows that the share of rentals among Arlington’s single-family zoned lots is significantly lower than for the county as a whole.<sup>18</sup> Another report by county staff noted that “Persons of Color are much more likely than White residents to rent.”<sup>19</sup> Nearly 80% of Black households and over 70% of Latino households are renters, compared to only about half of White households.<sup>20</sup> Against this backdrop, one County Board Member has repeatedly expressed opposition to allowing eight-plexes on the basis that many of the homes in eight-

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*Sunnyvale*, 109 F. Supp. 2d at 567 (“Sunnyvale’s ban on apartments and stubborn insistence on large lot, low density zoning also perpetuate racial segregation in Dallas County.”).

<sup>15</sup> See *Atkins v. Robinson*, 545 F. Supp. 852, 871 (E.D. Va. 1982) (listing “six factors to be considered in an effort to glean a discriminatory purpose from a defendant’s conduct: (1) the discriminatory impact of the official action; (2) the historical background of the decision; (3) the specific sequence of events leading up to the challenged decision; (4) departures from the normal procedural sequence; (5) departures from normal substantive criteria; and (6) the legislative or administrative history of the decision”) (cleaned up) (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–66 (1977)); see also *Smith v. Town of Clarkton, N.C.*, 682 F.2d 1055, 1066 (4th Cir. 1982) (noting that “in proving discriminatory intent under this test, racially disproportionate impact is a relevant factor for a court to consider”); *Town of Sunnyvale*, 109 F. Supp. 2d at 570 (concluding that “Plaintiffs have successfully demonstrated *more* than a reasonable inference that race was a significant factor in Sunnyvale’s planning decisions over the years,” which included “maintaining one-acre zoning” and “banning apartments”).

<sup>16</sup> See *Agenda Item #33 Report, supra*, at 6 (“[T]he draft GLUP amendment ... provides additional context for Arlington’s land use planning history, particularly how zoning decisions that pre-date the GLUP’s initial adoption in 1961 contributed to racial segregation. The draft text also acknowledges the GLUP’s role in carrying forward inequitable residential land use policies from an earlier era.”); Arlington County Staff, *Expanding Housing Choice: The Missing Middle Housing Study Phase I Report*, at 28 (Nov. 2021), available at [https://www.arlingtonva.us/files/sharedassets/public/housing/documents/missing-middle/mmhs\\_phase-1-report-final-draft.pdf](https://www.arlingtonva.us/files/sharedassets/public/housing/documents/missing-middle/mmhs_phase-1-report-final-draft.pdf) (“[O]ne of the legacies of historic land use and zoning policies designed to segregate neighborhoods is that 75 percent of Arlington’s residential land area is zoned exclusively for single-family neighborhoods.”).

<sup>17</sup> See Whitney Airgood-Obrycki, *Rental Deserts Perpetuate Socioeconomic and Racial Segregation* (Aug. 4, 2022), at <https://www.jchs.harvard.edu/blog/rental-deserts-perpetuate-socioeconomic-and-racial-segregation> (“The lack of rental options in many neighborhoods across the country reinforces enduring patterns of residential segregation.”).

<sup>18</sup> Arlington County Staff, *Missing Middle Housing Study: Expanding Housing Choice - County Board Request to Advertise*, at 33 (Jan. 21, 2022), available at [https://arlington.granicus.com/MetaViewer.php?view\\_id=2&clip\\_id=4191&meta\\_id=215695](https://arlington.granicus.com/MetaViewer.php?view_id=2&clip_id=4191&meta_id=215695) (noting that “15% of housing in R-5 to R-20 zones is rental, compared to 62% county-wide”).

<sup>19</sup> *2022 Briefing Report, supra*.

<sup>20</sup> Arlington County Staff, *Ownership Housing & Barriers to Homeownership in Arlington*, at 3 (Oct. 2022), available at <https://www.arlingtonva.us/files/sharedassets/public/housing/documents/homeownership-study/homeownership-barriers-analysis-10.25.22.pdf>.

plexes will be rentals.<sup>21</sup> By deliberately acting to restrict the supply of rentals, and thereby causing additional disproportionate harm to households of color in Arlington, the County Board has endorsed anti-renter sentiments and related “‘camouflaged’ racial expressions”<sup>22</sup> made to the Board by public commenters<sup>23</sup> and community conversation participants.<sup>24</sup>

The outcry from predominantly wealthy homeowners provides no defense to violations of federal laws like The Fair Housing Act. Any legitimate concerns could be addressed by less restrictive means than continuing to outlaw seven-plexes and eight-plexes, or other means than requiring massive lot sizes for five-plexes and six-plexes. It would certainly be no defense if the County Board wished to appease critics of the missing middle housing proposal. (Not that critics were actually appeased; only minutes after the Board voted to advertise the missing middle proposal,

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<sup>21</sup> Email from M. de Ferranti, *Labor Day & Our First Debate Tonight* (Sept. 6, 2022 9:47 a.m.) (“I do not support eightplexes because I think the costs for what will likely be rental units are greater than the benefit.”); Teo Armus, *Arlington’s sole county board race a proxy war over ‘missing middle’*, Wash. Post (Oct. 31, 2022), available at <https://www.washingtonpost.com/dc-md-va/2022/10/30/arlington-county-board-election-candidates/> (“de Ferranti defended his approach to the missing middle framework, denying that he was giving into pressure from critics concerned about how the plan will crowd their neighborhoods. The only board member to vocally oppose blanket legalization of eight-unit apartment buildings, he has echoed some talking points from those critics, saying that these ‘eightplexes’ would mostly result in one-bedroom rentals more vulnerable to developer speculation.”).

<sup>22</sup> *Town of Clarkton*, 682 F.2d at 1066 (examples include “testimony to the effect that Mayor Fort was concerned about an influx of ‘undesirables,’ and that residents at the March 31, 1980 public hearing opposed public housing since the new occupants would ‘dilute’ the public schools, and that they were concerned about personal safety due to the influx of ‘new’ people, ‘just as bad’ who would move into the houses vacated by those persons moving into the new low-income housing”).

<sup>23</sup> See, e.g., Public Comment by Audrey Clement to the Arlington County Board (Sept. 21, 2022), available at [http://arlington.granicus.com/MediaPlayer.php?view\\_id=2&clip\\_id=4137](http://arlington.granicus.com/MediaPlayer.php?view_id=2&clip_id=4137) (bemoaning that “the data suggest 80% will be rentals, not owner occupied”); Public Comments to the Arlington County Board (Jan. 21, 2023), available at [http://arlington.granicus.com/MediaPlayer.php?view\\_id=2&clip\\_id=4191](http://arlington.granicus.com/MediaPlayer.php?view_id=2&clip_id=4191) (“Option 2B is the reasonable and middle position for missing missing to achieve its stated goal of more affordable house ownership not more rentals.”; “There’s ongoing pressure to allow eight plexes on Arlington’s small lots, which county staff state will be one and two bedroom rentals not three-bedroom citizen-owned homes.”).

<sup>24</sup> Arlington County Staff, *Community Conversations Notes* (Oct. 28, 2022), at <https://www.arlingtonva.us/files/sharedassets/public/county-board/documents/misc/notes.missingmiddle.communityconversations10.28.22.final.post.pdf> (“Our neighborhoods will have ‘more’ criminal activity with lower income people who will want what their neighbors have.”; “Density, and certain things and people that accompany density, are associated with crime and violence. I pay a price to live in a safe, not dense community and I don’t want to have to move again because the character of my neighborhood changes.”; “Wouldn’t mind a duplex next door, but no 8 plexes. Don’t get to play the racial card.”; “I live in a neighborhood with 3 unit flats that are owned by investors and they create heat pockets, are run-down, have giant dumpsters, and unkempt yards - they are terrible neighbors and they are just another form of rental housing in Arlington.”; “I want to know why Arlington County doesn’t put it’s time into improving South Arlington. If they would improve the schools everyone would live there. It’s a cool place to live, but the schools are terrible.”; “[I] don’t think a 6 or 8 plex built for renters is a good solution.”; “My niece lives in Portland. ... Developer bought the lot, had by-right ability to put up whatever he wanted. He put up a 6-plex. Six adults are living there with 12 cars on a narrow street. ... It is a blight and an eyesore on the street. It has diminished the property values. This is very scary to us when we hear an 8-plex, a 6-plex, even a fourplex.”).



interest groups representing the proposal’s most outspoken critics tweeted screeds condemning it as “hopelessly confusing”<sup>25</sup> and “flawed,”<sup>26</sup> despite the Board’s concessions.)

The NAACP will continue to vehemently oppose any Arlington County Government policy that disproportionately or intentionally denies fair housing to people of color. In accordance with our bylaws, we are prepared to take additional action as necessary to ensure the County’s compliance with federal and state fair housing laws. **The NAACP will not be a bystander as government policies recreate discriminatory effects of the past by preventing people of color from enjoying the same benefits** as those living in the county’s wealthiest, whitest neighborhoods.

For these reasons, the NAACP cannot support the current missing middle housing proposal unless the County Board allows six-plexes, by right, across all of Arlington’s residential neighborhoods. To do otherwise would not only skirt the stated purpose of the Fair Housing Act “to provide ... for fair housing throughout the United States,”<sup>27</sup> but also continue to entrench segregation of Arlington’s neighborhoods that has persisted for nearly a century. The NAACP also expects the County Board to keep its pledge to build on the proposal after its enactment, which must include legalizing seven-plexes and eight-plexes. The Board has aptly defined equity as “all populations having access to community conditions and opportunities needed to reach their full potential and to experience optimal well-being.”<sup>28</sup> This outcome does not emerge on its own. It takes bold visioning, sound policymaking, and courageous leadership in the face of forces desperate to protect the status quo.

The NAACP calls on the Arlington County Board to expeditiously enact the missing middle housing proposal without causing any racially discriminatory effects, treatments, or impacts, and to ensure that all elements fully comply with applicable law. Anything less will be met with swift, persistent action from the NAACP.

Sincerely,



Michael Hemminger  
President, NAACP Arlington Branch

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<sup>25</sup> Arlingtonians for Our Sustainable Future (@asfvirginia), Twitter (Jan. 25, 2023 7:47 p.m.), at <https://twitter.com/asfvirginia/status/1618410171642019840>.

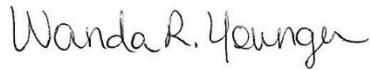
<sup>26</sup> Arlingtonians for Upzoning Transparency (@\_AFUT), Twitter (Jan. 25, 2023 8:30 p.m.), at [https://twitter.com/\\_AFUT/status/1618421041847762944](https://twitter.com/_AFUT/status/1618421041847762944).

<sup>27</sup> 42 U.S.C. § 3601.

<sup>28</sup> *Equity Resolution, supra*.



Bryan J. Coleman  
Chair, Housing Committee



Wanda Younger  
Branch Secretary

cc: Members of the County Board  
Mark Schwartz, County Manager  
MinhChau Corr, County Attorney  
Samia Byrd, Chief Race and Equity Officer, Deputy County Manager  
Claude Williamson, Director, CPHD  
Anthony Fusarelli, Jr., CPHD Planning Director  
Anne Venezia, CPHD Housing Director  
Devanshi P. Patel, Chair, Planning Commission  
Kellen M. MacBeth, Chair, Housing Commission  
NAACP Arlington Branch Executive Committee & Members  
NAACP Virginia State Conference  
NAACP National General Counsel