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COMPLETE OVERHAUL OF ARLINGTON COUNTY ZONING ORDINANCE

BY TAD LUNGER, ESQUIRE



As many readers are probably aware, Arlington County began the process of rewriting its Zoning Ordinance a couple of years ago. It completed the first initial revisions last summer by redrafting and replacing Section 34 (the Sign Ordinance) in its entirety. After a breather and tackling rewriting Chapter 15 of the Arlington County Code (the Noise Ordinance), staff have moved forward at full speed. With the help of outside consultants, the county is now completing "Phase II" by reorganizing and making changes to the entire Zoning Ordinance.

Phase II will consist of two back-to-back processes. Part A of Phase II, currently underway, is about reformatting and reorganizing the current Zoning Ordinance. Most significantly, the County intends to do away with the old "pyramid" structure that began in the 1940s and 1950s, which often leads readers on a wild goose chase of permitted uses through multiple zoning districts. As an alternative, staff has created a new use matrix concept for quick reference, as well as listing all uses in each district separately.

The County also intends to break up and do away with a number of current sections of the Zoning Ordinance and redistribute these portions to applicable zoning districts. For example, Section 31 (also known as the "junk drawer" or "the minefield"), which is full of special provisions and processes relating to multiple districts, will be broken up and redistributed throughout the ordinance accordingly. Part A of Phase II is scheduled to move very quickly, with commission hearings in March 2013, with the stated goal of having this before the County Board in April 2013.

Part B of Phase II is where most of the opportunity for mischief will be. Staff intends to incorporate many modern county "policies" into the ordinance. Generally speaking, it has been rare for the County Board of Arlington County to pass legislation that expands private property rights in Arlington. Many of the County's policies suggest an interest for more local government control of private property, so it will be important to pay attention to which County policies are sought to be incorporated in any legislative changes to the Zoning Ordinance. Also on the work list for Part B are creating definitions for currently undefined uses, incorporating zoning determinations and "administrative practices" into the new ordinance, and updating the ordinance to reflect current Virginia law. The Part B process is anticipated to begin in April 2013 and conclude by December 2013.

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CONSTRUCTION CONTRACTS: AVOIDING CLASHES AND IRRECONCILABLE DIFFERENCES

BY JUANITA F. FERGUSON, ESQUIRE



When the phrase “irreconcilable differences” is invoked, images of a feuding couple, and not parties to a construction contract, come to mind. In the case of *Suleyman Ciliv, d/b/a 77 Construction Contracting and Trading Company v. UXB International, Inc.* that was the case. In this instance, the United States District Court for the Western

District of Virginia ruled that a *quantum meruit* action cannot be pursued at the same time as a breach of contract action, and that the alternative theories of recovery were in fact, irreconcilable.

In *Suleyman*, the defendant, a prime contractor, entered into an agreement with the U.S. Government to build an Air Force Base in Afghanistan. Part of that agreement was that the defendant would enter into an agreement with the plaintiff, a subcontractor for construction services. A term of the subcontract was that the contractor would submit purchase orders to the subcontractor for the scope of work and upon completing the work, the subcontractor would submit invoices to the prime contractor, who would then submit them to the federal government.

Over time, a dispute arose between the parties and the defendant withheld payment from the plaintiff, citing the plaintiff’s failure to keep timesheets and receipts of purchases. The plaintiff sued the prime contractor for breach of contract and *quantum meruit* (i.e. the actual value of services performed). In response to the prime contractor’s motion to dismiss, the court ruled that there could be no recovery in *quantum meruit* where a valid contract between the parties exists.

It is a reality that parties to a construction contract may sometimes be at odds over the validity or the terms of a contract. However, under Virginia law, if a valid, express contract exists, then the parties are entitled to have their rights and duties adjudicated solely by its terms. So, how can a contractor avoid irreconcilable differences and having to risk pursuing a *quantum meruit* action that could be dismissed?

1) **Cut and paste in moderation.** It is not uncommon for a contractor to have a general contract that covers its needs for maybe 80 percent of its projects. So what happens with the other 20 percent of contracts to which it is a party? The contractor may cut and paste provisions from other contracts to make the general contract that is most often used “fit” for the particular contract. A dispute arises and the parties differ over the interpretation of a contract. The contractor now has to face the choice of filing a *quantum meruit* action if the contract is unclear.

2) **Limit your use of e-mails to address contract changes.** Parties sign a contract and then a flurry of communication occurs over the internet. If more than three or four e-mails occur about a proposed change, make a change order. It is a lot easier to establish that the parties agree to a contractual term with a signed change order than relying on strings of e-mails to prove a change. While it may be considered to be in writing, unless it is included in or referred to in the main contract, a party risks that an e-mail is a substitute for a contract or a written change order.

3) **Avoid clashes.** The term “clash” refers to a conflict that is discovered in a building information model, which is used to support owners, designers, and builders in planning construction work. For example, one building component may physically, yet unintentionally, penetrate another building component and thereby create a “clash.” Clashes tend to be fleeting and therefore, permanent records are seldom made of their occurrences. Take a proactive approach and avoid clashes in your contracts. For example, if your contract is subject to regulatory oversight, routinely perform an audit of your paperwork to ensure that a third party reviewing the contract would find it to be in compliance with applicable statutes and codes.

Various websites and portals either offer contract documents at a cost or free of charge. A standard-bearer in the industry for contract documents is the collection authored and maintained by the American Institute of Architects (“AIA”). The AIA has designed a library of contracts and documents that anticipates virtually every scenario that could arise in a construction project. Whether the issue relates to scope of work, means of dispute resolution or ability to cure, relevant and comprehensive construction contract documents are the key to minimizing the likelihood of having to rely on a theory of *quantum meruit* to seek payment for a construction project. No contract is perfect. It just needs to be good enough to encompass all potential sources of recovery.

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liabilities, negligence, and employment and insurance defense matters. She can be reached at jferguson@beankinney.com and 703-525-4000.

PROPOSED UPDATE TO ARLINGTON COUNTY'S NOISE CONTROL ORDINANCE

BY LAUREN K. KEENAN, ESQUIRE



The Arlington County Board is planning to hold a public hearing to discuss the proposed changes to the Noise Control Ordinance. According to the Arlington County website, the meeting is expected to take place sometime in the first quarter of 2013. The current noise ordinance is found within Chapter 15 of the Arlington County

Code and has been in place, relatively unchanged, since 1975. The purpose of the noise ordinance is to regulate and establish expectations for the control of environmental noise in our community and limit its escalation.

Plans to update the existing ordinance were first introduced at a series of three community meetings hosted by Arlington County, where interested parties including citizens, business owners and the development community had an opportunity to discuss the proposed recommendations for updating the ordinance.

The primary reason for the update was the removal of any reference to the "reasonable person standard," which is language that was identified as unconstitutionally subjective by the Virginia Supreme Court in its 2009 decision, *Tanner v. City of Virginia Beach*, and the use of more clearly objective, quantifiable and defined measurement standards. Under the new ordinance, all noise will be measured against a decibel (dB) standard which will vary depending on what type of noise is being regulated. For example, construction and special event noise will be limited to 90 dB, while the threshold for vehicular noise will be 70 to 90 dB. A noise meter is required to determine many of the noise violations under the new ordinance.

The updated ordinance focuses on several common sources of noise throughout the county, including loud parties and gatherings, construction noise, animal noise and live entertainment. Construction noise in commercial and residential areas is of particular concern - especially pre-dawn construction, pile driving and clanging of metal parts in

metal dumpsters (to name a few concerns referenced in the October 15, 2012 staff report to the county board). The new ordinance seeks to remedy some of these issues and bolster the requirements that developers and owners provide industry-standard sound mitigation solutions.

Some of the proposed changes to the ordinance include:

- **Civil penalties** on violators after a warning is issued or posted on the premises.
- **Criminal penalties** for violations would increase from \$25 to not less than \$100 or more than \$2,500 upon conviction.
- **New methods** to determine a noise violation that is above grade, or that occurs within multi-unit buildings. Learn more about the [new measurement standards](#).
- **Additional Exemptions** are added for specific noise producing activities (i.e. band performances or practices, church bells, and athletic contests).
- **Clarity** on the agencies and scope of work that are allowed exemptions to complete emergency repairs.
- **Enhanced prohibited acts** to address issues such as loud music and animal noises.
- **Appeals process** filed with Arlington County Community Planning, Housing and Development Department (CPHD) within five days of delivery of the citation.

The Arlington County Code Enforcement team from the CPHD is charged with enforcing the ordinance during regular hours, and after hours the Arlington County Police Department will be tasked with responding to noise complaints.

The proposed penalties are more severe under the new ordinance; however, it does provide that a warning must be issued before any citations or criminal charges apply and does introduce an appeals process. Under the new ordinance, violators would be subject to criminal and civil penalties for noise disturbances. When police officers witness the violation, they may issue a summons for a court appearance or arrest violators. Upon conviction, the court may fine the violator not less than \$100 dollars or more than \$2,500 dollars. However, each day in violation may be considered a separate offense multiplying the penalties imposed on the violator. The ordinance also introduces civil penalties, much like a traffic ticket that may be issued to the responsible parties associated with the noise violation. Civil penalties are imposed after a warning, and a violator may be fined up to \$250 for the first violation and up to \$500 for all violations that follow.

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A “noise disturbance” is defined by the new ordinance as an activity that exceeds the dB limitations established for a zoning designation or that is produced by a motor vehicle. In the past, the county board has issued special exceptions and site plan conditions to permit additional noise due to construction of a new building, or noise from live entertainment at bars and restaurants. Such conditions generally permit the noise for a regulated period of time, such as certain times of day. The county staff report dated October 15, 2012, suggests that the county is satisfied with the process of using special use permits to regulate live entertainment venues and that practice will likely continue. Under the current ordinance, the county manager also has authority to issue exemptions to the ordinance upon request. This authority is extended in the new ordinance as well.

The proposal now before the Arlington County Board from county staff would authorize advertisement for a public hearing to discuss Amending, Reenacting and Recodifying Chapter 15 of the Arlington County Code, to be effective upon adoption.

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