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## COMPELLED SPEECH: YOU CAN'T MAKE ME SAY THAT



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# AMICUS

*By:* AMANDA KARRAS,
*IMLA Executive Director and General Counsel*

## "Continuity of Government"- the Virginia Supreme Court's Minimalist View

As of the date of this article, we are still waiting for the Supreme Court to issue the vast majority of its decisions, including in several cases we are watching closely that will impact local governments.[1] We expect decisions in the most controversial cases to come down closer to the end of June (when the Term ends), though we never know exactly when the Court will issue opinions. While we await U.S. Supreme Court results, IMLA continues to be busy with our legal advocacy efforts nationwide, including in an important new case at the Virginia Supreme Court involving the intersection of local government emergency authority and virtual meetings.

**A County's New Zoning Ordinance:** In *Berry v. Board of Supervisors of Fairfax County,* the Supreme Court of Virginia invalidated Fairfax County's new zoning ordinance known as "Z-Mod" because it had been adopted via electronic meeting during the COVID-19 pandemic, which the court held violated the open meeting provisions of the Virginia Freedom of Information Act ("VFOIA") Code § 2.2-3700 et seq.[2] Z-Mod was adopted in March 2021, replacing a more than forty-year-old predecessor enacted in 1978. The new ordinance was codified after "extensive public outreach" which spanned more than five years and incorporated numerous editorial and substantive changes.[3] The modifications were material, including allowing more accessory living units by removing previous age and disability requirements, and changing the home-based business provisions of the previous ordinance, among others.[4]

**The Legislative Background:** The County was in the process of finalizing Z-Mod when COVID-19 emerged, resulting in governments around the country declaring states of emergency and moving from in-person public assembly to virtual meetings. Under VFOIA, "[n]o meeting shall be conducted through telephonic, video, electronic or other electronic communication means where the members are not physically assembled to discuss or transact public business, except as provided in § 2.2-3708.2[.]"[5] At the time Z-Mod was enacted, Va. Code Ann. § 2.2-3708.2 provided:

> [a]ny public body may meet by electronic communication means without a quorum of the public body physically assembled at one location when the Governor has declared a state of emergency in accordance with § 44-146.17, provided that (i) the catastrophic nature of the declared emergency makes it impracticable or unsafe to assemble a quorum in a single location and (ii) the purpose of the meeting is to address the emergency.

In parallel, the Virginia General Assembly had provided, pursuant to Virginia Code §15.2-1413, that:

> Notwithstanding any contrary provision of law, general or special, any locality may, by ordinance, provide a method to assure continuity in its government, in the event of an enemy attack or other disaster. Such ordinance shall be limited in its effect to a period not exceeding 12 months after any such attack or disaster and shall provide for a method for the resumption of normal governmental authority by the end of the 12-month period.[6]

**The Continuity Ordinance:** Facing the COVID-19 state of emergency, the County adopted a "Continuity Ordinance" pursuant to the General Assembly legislation, "to establish[] methods to assure continuity in Fairfax County government, including Board of Supervisors' procedures for meetings, during the COVID-19 emergency[.]"[7] Section 1(D)(1) of the Continuity Ordinance provided that "[f]or any meeting at which the Board . . . transacts public business with any purpose other than addressing the emergency or assuring continuity in Fairfax County government, the Board . . . will meet in accordance with all usual procedures established by the Virginia Freedom of Information Act."

The County defined "continuity" as including:

> without limitation, those actions, and the coordination of actions, that are necessary to assure the continuation of the County's essential functions and services. By way of example and not limitation, such necessary actions include those related to (1) the County's finances, such as the public hearings and adoption of the

FY 2021 budget, tax rate, and utilities fees; appropriations of funds; and funding requests; (2) contracts that need Board action; (3) applications, appeals, or other requests that are subject to mandatory or directory time frames for action; (4) satisfying due process and other constitutional requirements; (5) public safety; and (6) measures that help sustain the County's economy.[8]

Based on the Continuity Ordinance, the County adopted Z-Mod via electronic meeting in March of 2021.

**Differing Interpretations of "Essential":** County residents rapidly challenged the action as impermissible under VFOIA, but the Fairfax County Circuit Court upheld the adoption of Z-Mod, concluding that "[z]oning is inherently an essential act of local government[,]… critical, especially in the context of a national emergency…"[9]

The Virginia Supreme Court reversed. It concluded that the legality of the County's actions hinged on whether the adoption of Z-Mod was done to "assur[e] continuity" of the government pursuant to the Continuity Ordinance. The court declined to rule on what it called the broader question of whether the statutory authority granted by the Virginia legislature empowered the County (and other localities) to conduct any of its ordinary business under the emergency procedures without regard to VFOIA. Instead, the court focused its inquiry on whether adoption of Z-Mod was authorized by the Continuity Ordinance, ultimately agreeing with the Residents' arguments that zoning fell within the ambit of "ordinary business" and was not necessary to assure the continuity of government.[10]

The Virginia Supreme Court conceded that the County's definition of "continuity" in the Continuity Ordinance was not exhaustive and was merely intended to be illustrative, but it nevertheless concluded that for something to be considered necessary to the continuity of the government there must be an "implied temporal element."[11] The court reasoned that "[i]f an issue does not require immediate attention, it cannot fairly be classified as 'necessary' to allow the County government to continue with essential functions and services."[12] Given that Z-Mod resulted from a multi-year process, the court concluded there were no imminent deadlines and no reason to believe it was necessary or essential to the continued operations of the County.

The court rejected the County's argument that zoning is "an essential local government function." Notwithstanding prior Virginia Supreme Court decisions recognizing the centrality of the zoning power, the court explained that even if the zoning power[13] is essential, that does not make a particular zoning decision essential.[14] The court thus concluded that the County violated VFIOA by enacting Z-Mod via electronic meeting and was therefore void *ab initio*.

**IMLA's View:** While open meetings requirements are important to promote transparency in government, here the County complied with VFOIA and was acting in a manner authorized by the General Assembly to ensure safe operations for the County's workers and inhabitants during a deadly pandemic that took the lives of nearly 1,800 County residents. The County's actions were similar to those of local governments around the country that swiftly and commendably turned to virtual meetings to help continue operating essential services for their residents.

Importantly, when the County enacted Z-Mod, there was no indication when the pandemic would subside. COVID-19 had been raging for a year, and while vaccines were newly available to some at the time, there was no known timeline to the crisis. The Virginia Supreme Court's conclusion that zoning was not "essential" to the operation of government not only ignores Virginia case law clearly stating the contrary, but also ignores the fact that at the time, nobody knew when the pandemic would end and when "normal" life could resume.

*Berry* is an impediment for Virginia's most populous county, putting Z-Mod on ice and reverting the County back to its previous 1978 zoning ordinance. There are myriad questions about what this decision means for the County in terms of existing permits, variances, transactions, and construction that has already begun under Z-Mod. In the meantime, the County is moving forward on multiple tracks and appears to be setting new public hearings to try to readopt the ordinance via in-person meetings while also pursuing its petition for rehearing with the Virginia Supreme Court.

While the court purported to be ruling only on a narrow question, focusing its inquiry on Z-Mod and the County's Continuity Ordinance, other localities in Virginia nevertheless face a good deal of uncertainty due to this decision. It seems likely that the 134 local governments in Virginia passed similar continuity measures during COVID, potentially calling into question a host of other legislative actions throughout the state adopted via electronic meeting during the COVID virtual time-period. Any disgruntled resident unhappy with a particular legislative action can use this decision to seek to invalidate legislation enacted during a virtual meeting. And regardless of the outcome of future lawsuits, local governments in Virginia now face a tremendous amount of uncertainty as a result of *Berry* and will likely encounter increased litigation, which will do nothing except waste valuable time, money, and resources that could be spent on addressing other problems the localities are facing.

The Virginia Supreme Court's decision will no doubt have a destabilizing effect for other local governments in the Commonwealth, which is why IMLA is joining an amicus brief in support of the County's petition for rehearing in this matter. ML

*Continued on page 36*

**Compelled Speech** *cont'd from page 15*

the Texas Medical Board); and Texas Occupations Code §554.002 (providing that the Texas State Board of Pharmacy regulates the practice of pharmacy).
80. *See* Dall. Merch.'s & Concessionaires Ass'n. v. City of Dallas, 852 S.W.2d 489 (Tex. 1995).
81. *Hunter*, 207 U.S. at 178.
82. *See, e.g.*, Pleasant Grove City v. Summum, 555 U.S. 460 (2009).
83. "[I]t seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies." Bd. of Regents v. Southworth, 529 U.S. 217, 229 (2000)
84. Johanns v. Livestock Marketing Ass'n, 544 U.S. 550, 559-60 (2005).
85. *Id*. at 553.
86. *Id*. at 557.
87. *Id*. at 557-58.
88. *Id*. at 559.
89. *Wooley*, 430 U.S. at 715.
90. *Johanns*, 544 U.S. at 557.
91. *Wooley*, 430 U.S. at 716-17.
92. *Id*. at 716.
93. *Id*.
94. PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 85-88 (1980).
95. *Id*. at 77.
96. *Id*. at 87.
97. *Id*.
98. *Id*.

**Amicus** *cont'd from page 23*

## Notes

1. These include *Groff v. DeJoy* (a Title VII religious accommodation case); *303 Creative v. Elenis* (which involves the intersection of free speech and anti-discrimination laws); *Harper v. Moore* (the Independent State Legislature Theory case); *Tyler v. Hennepin County* (an important Takings case); *Sackett v. Environmental Protection Agency* (a WOTUS case); and National *Pork Producers Council v. Ross* (which involves the dormant commerce clause and the extraterritoriality principle).
2. Berry v. Bd. of Supervisors of Fairfax Cnty., No. 211143, 2023 WL 2604163, at *9 (Va. Mar. 23, 2023).
3. *Id*. at *1.
4. *See* Fairfax County Zoning Ordinance Modernization Project: Notable Changes from the 1978 Ordinance (April 6, 2021), available at: https://www.fairfaxcounty.gov/planning-development/sites/planning-development/files/assets/documents/zmod/executive-summary-notable-changes.pdf.
5. Va. Code Ann. § 2.2-3707(B).
6. In 2021, the General Assembly amended Va. Code Ann. § 15.2-1413 to allow a continuity ordinance to remain in effect for twelve months rather than six months.
7. The court refers to the County's ordinance as the "Continuity Ordinance" as it was an uncodified ordinance that was adopted on April 14, 2020.
8. *Id*. at *10, citing the Continuity Ordinance 1C
9. *Id*. at 3.
10. Berry, 2023 WL 2604163, at *9.
11. *Id*. at *10.
12. *Id*.
13. *See* Board of Supervisors v. Board of Zoning Appeals, 268 Va. 441, 446 (2004) (quoting Hadacheck v. Sebastian, 239 U.S. 394, 410 (1915)) ("a local government's exercise of its zoning authority is 'one of the most essential powers of government[.]'")
14. Berry, 2023 WL 2604163, at *11.

**Removing Individuals** *cont'd from page 13*

to cross a particular parcel of land, enter a chosen dwelling, or gain admittance to a specific government building"); *see also* Harper v. Houston, 2017 U.S. Dist. LEXIS 214988, at *9 (W.D. Tenn. Nov. 15, 2017) ("municipalities are constitutionally permitted to limit access to facilities without impinging on the right to free movement"); *see also* Hannemann v. S. Door County Sch. Dist., 673 F.3d 746, 757 (7th Cir. 2012) (right to intrastate travel protects the right to move from place to place, not the right to access certain public places such as community centers and government office buildings); *see also* Banuelos v. Martinez, 2015 U.S. Dist. LEXIS 76039, at *7-8 (E.D. Cal. June 10, 2015) (no liberty interest to enter into any state office without restriction); *see also* McCraw v. City of Okla. City, 973 F.3d 1057, 1080-81 (10th Cir. 2020) (fundamental right to freedom of movement applies only interstate travel, not intrastate travel).
35. *See* Hirt v. Unified Sch. Dist. No. 287, 2019 U.S. Dist. LEXIS 70477, at *32 (D. Kan. Apr. 24, 2019) (policy not void for vagueness because it clearly spelled out the conduct that may lead to someone being denied access to a school).
36. Thomas v. Chi. Park Dist., 534 U.S. 316, 317 (2002).
36. *See* Yeakle v. City of Portland, 322 F. Supp. 2d 1119, 1122 (D. Or. 2004) ("A narrowly-tailored ordinance would not have a one-size-fits-all 30-day exclusion irrespective of the nature of the violation.").
37. *See* Cyr v. Addison Rutland Supervisory Union, 60 F. Supp. 3d 536, 552 (D. Vt. 2014) (notices against trespass deficient because they were not issued pursuant to any protocol and did not set out a process for contesting the notices); *see also* Sanchez v. City of Austin, 2012 U.S. Dist. LEXIS 190686, at *21-25 (W.D. Tex. Sep. 27, 2012) (city violated the protestor's procedural due process rights because of the broad guidelines provided for use by officials in implementing the policy, the lack of notice, and the post-deprivation-only nature and burden placed on the ban recipient for appeal process).