

WALTER C. ERWIN, ESQ.

WALTER C. ERWIN, III

ATTORNEY AT LAW
101 PADDINGTON COURT
LYNCHBURG, VIRGINIA 24503

TELEPHONE (434) 229-4996

E-MAIL: erwinwc@aol.com

June 8, 2023

(report revised)

Tabrica C. Rentz, Esq.
Deputy City Attorney
Office of the City Attorney
900 East Broad Street, Suite 400
Richmond, VA 23219

Re: Review of the Richmond City Charter

Dear Ms. Rentz:

I appreciate the opportunity to assist the City Attorney's Office with the review of the Richmond City Charter.

Virginia's cities get their powers from two sources, their charters, in which the General Assembly grants powers to a specific city and the general laws adopted by the General Assembly which confer powers to all cities.

When Virginia's older cities, such as Richmond, were granted their charters, there were few general laws granting powers to these cities. In the absence of general laws, city charters attempted to cover every detail of a city's operations, defining the organization, powers, functions and essential procedures of city government.

Over the years the General Assembly adopted an increasing number of general laws granting powers to cities, and there may be provisions in an older city's charter that are inconsistent with or duplicate the state's general laws. A city charter can also become complicated as a result of piecemeal revisions. Differences between the provisions in a charter and the Commonwealth's general laws can be confusing.

A city charter may benefit from a comprehensive review to identify obsolete provisions and provisions that duplicate general state laws. The length and detail of an older charter may discourage citizens interest in and understanding of the charter. Identifying and removing outdated provisions from a charter can make the charter easier to understand and help a city decide if it needs to amend existing charter provisions or add new ones.

More recent city charters (Chesapeake-1980 and Virginia Beach-1962) take the approach of relying on state laws for most of their general powers and do not include long lists of powers in their charters. Such charters state that they will have the powers and duties provided by the

general laws of the state and then include the special powers and duties that are specific to their localities and not provided by general law. For example, the Virginia Beach Charter contains the following provision:

The powers set forth in sections 15.1-837 through 15.1-907 of the Code of Virginia as in force on January 1, 1977, and as hereafter amended, are hereby conferred on and vested in the City of Virginia Beach. In addition thereto the City of Virginia Beach shall have and may exercise all other powers which are now or may hereafter be conferred upon or delegated to cities of the first class under the Constitution or laws of the Commonwealth, as fully and completely as though such powers were specifically enumerated in this Charter and no enumerations of particular powers in this Charter shall be held to be exclusive but shall be held to be in addition to this general grant of powers.

As requested, I reviewed the Richmond City Charter to identify areas of the Charter that are contained in general law and could possibly be removed, and to identify areas of the Charter that appear to be outdated or otherwise inapplicable. My review did not include recommending policy changes. For example, Chapter 6. Budgets of the City Charter provides a much more detailed budget process for Richmond than is required by Title 15.2, Chapter 25 of the Virginia Code. It is a policy decision for the Richmond Charter Review Commission to decide if the current budget process meets the City's needs or should be revised.

In reviewing the City Charter, I placed my highest priorities on simplification, consistency with state law, and identifying any provisions in the Charter that give Richmond special powers that are not granted by general law. My observations and comments regarding the City Charter are as follows:

Chapter 2. Powers

- §2.02(a) of the City Charter sets forth the City's financial powers. The powers granted to the City in §2.03(a) are also granted to a city under the state's general laws. For example: Chapter 30 of Title 58.1 of the Virginia Code authorizes a city to levy taxes on real and tangible property, machinery and tools, to impose license taxes, and to impose various miscellaneous taxes; §58.1-3814 authorizes a city to impose a consumer utilities tax on the customers of utility services; §15.2-1104 authorizes a city to annually raise taxes and assessments on property, persons, and other subjects of taxation; §15.2-1104.1 authorizes a city to levy an admissions tax; the provisions in Chapter 21 of Title 15.2 authorize a city to establish rates and charges for public utility services; §15.2-2001 authorizes a city to establish highway user fees; etc. While I believe §2.03(a) could be removed from the City Charter since the financial powers granted to the City in §2.03(a) are also granted to the City under the state's general laws, it may make sense to keep §2.03(a) in the Charter so the summary of the City's financial powers is contained in one place instead of having to search for such powers among the various sections of the Virginia Code.

- §2.02(b) of the City Charter authorizing the City to borrow money could be removed from the City Charter. §15.2-1105 of the Virginia Code and Article VII, §7 of the Virginia Constitution authorize a city to borrow money.

- §2.02(c) of the City Charter authorizing the City to make appropriations could be

removed. Article VII, §7 of the Virginia Constitution authorizes a city to appropriate money.

- §2.02(e) of the City Charter authorizing the City to accept or refuse gifts, donations, bequests or grants could be removed. §15.2-1108 of the Virginia Code authorizes a city to accept or refuse gifts, donations, bequests or grants.

- §2.02(f) of the City Charter authorizing the City to provide support to public libraries and public schools could be removed. §42.1-33 of the Virginia Code authorizes a city to establish and support libraries, and § 22.1-88 of the Virginia Code and Article VIII, §2 of the Virginia Constitution authorize and require a city to provide funds to the public schools.

- §2.02(g) of the City Charter authorizing the City to provide financial aid to military companies and to charitable and benevolent institutions and corporations could be removed. §15.2-1112 of the Virginia Code authorizes a city to grant financial aid to military units and §15.2-953 authorizes a city to make donations of public funds, personal property and real estate to a variety of charitable, nonprofit institutions and associations.

- §2.03. Powers relating to public works, utilities and properties, of the City Charter sets forth the city powers relating to public works, utilities, and properties. The powers granted to the City in §2.03 are also granted to a city under the state's general laws. For example: §15.2-2001 of the Virginia Code authorizes a locality to lay out and maintain streets, sidewalks, and public rights of way; §15.1122 authorizes a city to operate parking lots; §15.2-1123 authorizes a city to operate an airport and related facilities; Chapter 21, Articles 2,3,4, and 5 of Title 15.2 authorize a city to operate public utilities; §15.2-1800 authorizes a city to operate, maintain, and regulate the use of its real property; §15.2- 1808 and §15.2-1811 authorize a city to operate stadiums, arenas, swimming pools and parks; §15.2-1800 and §15.2-2100 authorize a city to dispose of its property; §15.2-927 authorizes a city to provide refuse services; §33.2-700 authorizes a city to establish and maintain streets; etc. While I believe §2.03 relating to public works, utilities and properties, could be removed from the City Charter since the powers granted to the City in §2.03 are also granted to the City under the state's general laws, it may make sense to keep §2.03 in the Charter so the summary of the City's powers regarding public works, utilities, and properties are in one place instead of having to search for such powers among the various sections of the Virginia Code.

- §2.04(a) of the City Charter authorizing the City to provide for the prevention of vice, immorality, vagrancy, drunkenness, riots, suppression of houses of ill fame, gambling houses, lewd and disorderly conduct, etc. should be updated or removed from the Chapter. In recent years, most laws and ordinances regulating vice, immorality and vagrancy have been struck down as unconstitutional, so the City's ability to regulate such activities is questionable. Activities such as drunkenness, riots, suppression of houses of ill fame, gambling houses, lewd and disorderly conduct, etc. are covered by a variety of other laws and regulations. For example: §18.2-415 of the Virginia Code authorizes a city to adopt an ordinance regulating disorderly conduct in public places; §15.2-925 allows a city to regulate riots; §18.2-388 prohibits intoxication in public places; §15.2-907 authorizes a city to adopt an ordinance to deal with drug blighted properties; §15.2-908.1 authorizes a city to adopt an ordinance to deal with bawdy places and places of prostitution; §4.1-317 deals with places where alcoholic beverages are manufactured, stored, sold dispensed, given away or used in violation of law; etc.

- §2.04(b) and (k) of the City Charter authorizing the City to regulate the construction, maintenance and repair of buildings and structures could be removed. A local government's authority regarding the construction, maintenance, rehabilitation and repair of buildings and

structures is granted and regulated by the Uniform Statewide Building Code.

- The provision in §2.04(c) of the City Charter dealing with special police officers may need to be reviewed and updated. In 2003 the General Assembly amended Section 15.2-1737 of the Virginia Code to provide that all appointments of special police officers by the circuit courts “shall become void on September 15, 2004” and authorized the Virginia Department of Criminal Justice Services to develop training requirements for individuals who wanted to be appointed as special conservators of the peace. If Richmond’s special police officers are appointed by the circuit court judges such appointments would be questionable in view of the 2003 legislation. However, if Richmond’s special police officers are appointed by the police chief or the mayor it can be argued that since the Charter is special legislation it takes precedence over general laws and the 2003 amendments did not take away the Richmond’s authority to appoint special police officers pursuant to the City Charter.

- §2.04(d) of the City Charter authorizing the City to regulate the use of streets, alleys and public places and to grant permits and charge fees for the use of the same is not needed. §15.2-2017 of the Virginia Code prohibits utilities from using public streets and alleys without the consent of a city, §15.2-1800(E.) authorizes a city to maintain, and regulate the use of its real property, and §15.2-1125 authorizes a city to issue licenses and permits for the use of its streets, alleys and public places.

- §2.04(e) of the City Charter authorizing the City to deal with encroachments in the public rights of way could be removed. §15.2-2009, §15.2-2010 and §15.2-2011 of the Virginia Code give the City the authority to deal with encroachments in the public rights of way.

- §2.04(f) of the City Charter authorizing the City to regulate railroads could be removed. The preemption provisions contained in 49 U.S.C. 10501(b)(1) and the Interstate Commerce Commission Termination Act of 1995 shield railroad operations from local laws and regulations that might prevent or interfere with railroad operations. To the extent the City has the authority to regulate railroads, such authority does not come from the City Charter but from such regulatory powers as the Uniform Statewide Building Code, the Uniform Statewide Fire Code, erosion and sediment control regulations, zoning regulations, etc.

- §2.04(g) of the City Charter authorizing the City to regulate the operation of motor vehicles and exercise control over traffic could be removed from the City Charter. Chapter 13, §§46.2-1300 through 46.2-1314, of Title 46.2 of the Virginia Code give a city the authority to manage the operation of motor vehicles and exercise traffic control.

- §2.04(h) of the City Charter authorizing the City to regulate such things as: the production and distribution of milk; the regulation of water and sewer pipes; the construction of and use of septic tanks; the management of persons afflicted with contagious or infectious diseases; the regulation of private hospitals and convalescent homes; etc. could be removed. These types of issues are covered by a variety of other laws and regulations. For example: §15.2-1109 of the Virginia Code authorizes a city to regulate the production, storage, and sale of milk and food products and §15.2-1110 authorizes a city to regulate swimming pools lakes and other waters. Under state law the Virginia Department of Health also oversees the production and distribution of milk and foods, the construction and use of septic systems, the quarantine of persons afflicted with contagious and infectious diseases, and the operation of private hospitals,

convalescent homes, etc.; and, the Uniform Statewide Building Code regulates the construction and maintenance of plumbing fixtures and toilets.

- §2.04(i) of the City Charter authorizing the City to regulate cemeteries and burials could be removed. §15.2-1111 of the Virginia Code authorizes a city to regulate cemeteries and burials.

- §2.04(j) of the City Charter authorizing the City to regulate dangerous or unhealthy businesses, trade or employment and the transportation of offensive and dangerous substances is not needed. Section 15.2-1113 of the Virginia Code gives a city the authority to regulate dangerous, offensive or unhealthful businesses, trade or employment and to regulate the manufacture, storage, transportation of offensive and inflammable substances.

- §2.04(l) of the City Charter authorizing the City to regulate the emission of smoke, the installation and operation of fuel burning equipment, internal combustion engines and other sources of air pollution could be removed. §15.2-1116 of the Virginia Code authorizes a city to regulate smoke and fuel-burning equipment and Chapter 13 of Title 10.1 of the Virginia Code gives the Virginia Pollution Control Board the authority to control and regulate air pollution within the state.

- §2.04(m) of the City Charter authorizing the City to deal with nuisances could be removed from the City Charter. §15.2-900, §15.2-901, §15.2-906 and §15.2-1115 of the Virginia Code give a city broad authority to deal with nuisances.

- §2.04(n) of the City Charter authorizing the City to regulate the possession and use of explosive or inflammable substances, the use of fireworks, and firearms could be removed. The possession and use of explosive or inflammable substances and the use of fireworks is regulated by the Uniform Statewide Fire Code. Also, §15.2-1113 of the Virginia Code gives a city the authority to regulate dangerous businesses or employment, the transportation of offensive substances, and explosive or inflammable substances, the discharge of fireworks, and, §15.2-915 of the Virginia Code gives a city the authority to regulate firearms within the parameters of the statute.

- §2.04(o) of the City Charter authorizing City to regulate the making of fires in the streets, alleys and other public places is not needed. §15.2-1800(E.) of the Virginia Code authorizes the City to maintain, and regulate the use of its real property and the Virginia Uniform Statewide Fire Code regulates the making of fires.

- §2.04(p) of the City Charter authorizing the City to regulate the running at large and keeping of animals and fowl could be removed. §15.2-1108 of the Virginia Code authorizes a city to regulate the running at large and the keeping of animals and fowl.

- §2.04(r) of the City Charter authorizing the City to regulate: auctions; the sale of goods; pawnshops; the peddling or hawking of articles for sale on the public streets; the regulation of weights and measures; etc. could be removed. Various provisions of the Virginia Code give a city the authority to deal with these matters or deal with such matters at the state level. For example: §15.2-1114 of the Virginia Code authorizes a city to regulate auctions, pawnshops, secondhand dealers, peddling, fraud and deceit in sales, and weights and measures; §54.1-4001 and §54.1-4003 impose regulations on pawnshops; §15.2-913 authorizes localities to adopt ordinances that regulate door to door solicitation; §59.1-201 authorizes a locality to deal with

consumer protection complaints; the Virginia Department of Agriculture and Consumer Services has a Weights and Measures Bureau to oversee weights and measurements throughout the state; etc.

- §2.04(q) of the City Charter authorizing the City to prevent cruelty to and abuse of animals could be removed. Among other powers dealing with animals, the Virginia Comprehensive Animal Care Act gives a city the authority to deal with animal cruelty and abuse.

- §2.05(b) of the City Charter authorizing the City to provide and operate hospitals, sanatoria, convalescent homes, clinics, institutions, and facilities for the care and treatment of the sick, of children, the aged, and the destitute could be removed. §15.2-1119 of the Virginia Code authorizes a city to provide and operate hospitals for the sick, for children, the aged, and the destitute, and the indigent.

- §2.05(c) of the City Charter authorizing the City to provide care and public assistance for the poor could be removed. Article 2, of Title 63.2 of the Virginia Code authorizes and establishes the terms on which a city provides public assistance to the poor.

- §2.05(d) of the City Charter authorizing the City to establish and operate cemeteries could be removed. §15.2-1121 of the Virginia Code authorizes a city to provide and operate cemeteries.

- §2.05(g) of the City Charter dealing with bingo games and raffles could be removed. As a result of amendments to the Virginia Code, bingo games and raffles are no longer regulated by local governments, but are regulated by the Virginia Charitable Gaming Commission.

- §2.06 of the City Charter dealing with the enforcement of regulations could be removed. The provisions of §2.06 dealing with the establishment of penalties for violations of ordinances, requiring bonds of persons convicted of ordinances, appeals of convictions, and seeking injunctions are covered in §15.2-1429, §15.2-1430, §15.2-1431, and §15.2-1432 of the Virginia Code. §2.06 also provides that the bond for someone convicted of violating a city ordinance shall not be more than \$2,000, while §15.2-1430 provides that the bond shall not be more than \$5,000.

Chapter 3. Elections

- The provisions in Chapter 3 are consistent with the provisions of the Virginia Code and I do not see a need for any changes to Chapter 3 unless the Richmond Charter Review Commission believes some changes are needed.

Chapter 4. Council

- I recommend that §4.06 of the City Charter dealing with City Council's Rules of Procedure or City Council's Rules of Procedure be amended to include the following provision:

City Council's rules of procedure are designed and adopted for the benefit and convenience of the City Council. Their purpose is to help the City Council conduct its affairs in a timely and efficient manner. The rules of procedure incorporate the general principles of parliamentary procedure found in Robert's Rules of Order and applicable Virginia laws. The rules of procedure do not create substantive rights for third parties or

participants in proceedings before the City Council. Further, the City Council reserves the right to suspend or amend the rules of procedure whenever a majority of the Council decides to do so. The failure of the City Council to strictly comply with its rules of procedure shall not invalidate any action of the Council.

- Currently §4.07 of the City Charter provides that City Council must vote by roll call. The City may wish to amend §4.07 to allow voting by electronic means.

- Currently §4.09 of the City Charter provides ordinances must be “introduced in typewritten or printed form or a combination of both.” The City may wish to amend §4.09 to allow ordinances to be introduced in an electronic format.

- §4.15(a) of the City Charter gives City Council the authority to remove a member of a board or commission who was appointed for a specified term of office for malfeasance in office or neglect of duty. §4.15 is a special removal power that has not been granted to cities by the state’s general laws. While there is no general law authorizing a local governing body to remove a member of a board or commission, there are provisions in the Virginia Code that give a governing body the authority to remove members of specific boards and commissions. For example, the Virginia Code provides that a governing body may remove a member of a community services board for cause and provides that a governing body may remove a member of the planning commission for malfeasance in office or for missing too many meetings.

The Virginia Attorney General advises that when a board or commission is established pursuant to state law and the members of the board or commission have been given a specific term of office, a governing body does not have the authority to remove a member of the board or commission before the end of their term of office unless the state code gives the local governing body the power of removal. The Attorney General also advises when state law provides for the establishment of a board or commission but does not specify a term of office for the members of the board or commission, the authority of a governing body to appoint members to the board or commission includes the implied power to remove the members if the governing body decides it is appropriate to do so.

Since §4.15(a) of the City Charter gives City Council special authority to remove the members of boards and commissions before the end of their terms of office that is not granted to governing bodies by the state’s general laws, §4.15 should be preserved.

- §4.15(b) of the City Charter provides that any officer, appointee of the Council or employee of the City who shall be convicted on a charge involving moral turpitude or any felony or any misdemeanor involving possession of marijuana or controlled substances shall forfeit their office or employment. §24.2-230 through §24.2-238 of the Virginia Code provide a procedure by which local officers who are convicted of certain criminal offenses including the manufacture, sale, distribution or possession of any controlled substance or marijuana may be removed from office. Further, §24.2-231 of the Virginia Code provides that any person holding any “public office of honor, profit, or trust” who is convicted of a felony shall forfeit their office. However, there is no comparable provision to §4.15(b) in the Virginia Code which requires that a local officer, appointee, or employee who is convicted of a misdemeanor involving the possession of marijuana or controlled substances shall automatically forfeit their office or employment. The forfeiture of office/employment provision in §4.15(b) of the City Charter is more restrictive than state law and the Richmond Charter Review Commission may wish to determine if §4.15(b) continues to serve the City’s best interests.

- §4.16(a) of the City Charter gives the City Council the authority to conduct investigations relating to the municipal affairs of the City. §15.2-1409 of the Virginia Code authorizes a governing body to conduct investigations relating to its government affairs as it deems necessary, including the authority to order the attendance of witnesses and the production of books and papers and may administer oaths. While §4.16(a) relating to powers of investigation, could be removed from the City Charter since the powers granted to the City in §4.16(a) are also granted to the City under the state's general laws, it may make sense to keep §4.16(a) in the Charter so the summary of the City's powers of investigation will be contained in one place instead of both the City Charter and the Virginia Code.

- §4.17 of the City Charter provides that the City Attorney shall be appointed by the City Council and shall be the chief legal advisor of the City Council, the Mayor, the Chief Administrative Officer and all departments, boards, commissions and agencies of the City. I noted that in the City Charter Review Commission Report dated September 24, 2009, there was some discussion of having the Mayor appoint the City Attorney subject to the consent of a majority of City Council. I would not recommend amending §4.17 to change the manner in which the City Attorney is appointed. Under the Rules of Professional Conduct for attorneys, a government attorney's paramount duty is to the entity itself, and not the individual officers and officials connected with the entity. The appointment of the City Attorney by the City Council reinforces the fact that the City Attorney's paramount duty is to the City as a whole, and not to serve the individual officers and officials that make up the City. Most city councils in cities with the council-manager form of government appoint the city attorney.

Chapter 5. Mayor

- Among Virginia's cities, Richmond has a unique form of government. Every city but Richmond follows the council-manager form of government which was developed by the City of Staunton in 1908. Under the council-manager form of government the city council appoints a professional city manager who serves at the pleasure of the city council and who administers the day-to-day affairs of the city. Richmond has a strong mayor form of government in which the Mayor and the Chief Administrative Officer, who is appointed by the Mayor, carry out the duties that are normally assigned to the city manager and administer the day-to-day affairs of the City. Given Richmond's unique form of government, I am not in a position to recommend changes to Richmond's current form of government; any recommendations in this area fall within the purview of the Richmond Charter Review Commission.

Chapter 5A. Administration

- §5A.03 of the City Charter provides that the City's personnel system "shall not discriminate on the basis of race, national origin, religion, sex, age, disabilities, political affiliation, or marital status." In 2020 and 2021, §2.2-3900 of the Virginia Code was amended to expand the categories of citizens that are protected from discrimination to include "race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, sexual orientation, gender identity, military status, or disability." The City may wish to amend §5A.03 to include the additional categories of citizens who are protected from discrimination.

Chapter 5B. Retirement System

- Richmond has developed its own retirement system to provide retirement, disability, and survivor benefits for the City's employees. It would not be prudent to recommend any

changes to Chapter 5B without first consulting with and seeking the advice of the executive director and trustees of the retirement system.

Chapter 6. Budgets

• As previously noted, Chapter 6. Budgets, of the City Charter provides a much more detailed budget process for Richmond than is required by Title 15.2, Chapter 25 of the Virginia Code. The Mayor's role in the budget process is similar to the traditional role of the city manager in cities that follow the council-manager form of government. Every city has its own personality, and what works in one city may not work in another. Richmond's current budget process may fit the City's needs and may not need to be changed unless the Richmond Charter Review Commission believes some changes to the budget process are appropriate.

Chapter 7B. Borrowing

• I do not believe it would be prudent to recommend any changes to Chapter 7B without first consulting with the City's bond counsel. The City would not want to make any changes that might have an adverse impact on the City's bond rating or which would be inconsistent with the bond documents and procedures that have been developed by the City's bond counsel over the years.

Chapter 8. Financial Administration

• The provisions in Chapter 8 are consistent with the provisions of the Virginia Code and I do not see a need for any changes to Chapter 8 unless the Richmond Charter Review Commission believes some changes are needed.

Chapter 13. Department of Public Utilities

• I am not familiar with the day-to-day operations of the Department of Public Utilities and do not believe it would be prudent to recommend any changes to Chapter 13 without consulting with the Department Director and the City Attorney's Office before considering any changes.

Chapter 17. Planning, Zoning and Subdivision Control

In reviewing Chapter 17 of the City Charter, I placed my highest priorities on simplification, consistency with state law, and avoiding potential challenges to zoning decisions that could result from conflicts between the Charter and state law, and preserving any provisions in Chapter 17 that give Richmond special zoning powers not provided by general law.

As part of my review, I also looked at the charters of Chesapeake, Norfolk, and Virginia Beach and considered the zoning provisions they include in their charters. The Norfolk City Charter does not contain any provisions specifically dealing with zoning; it references the state's general laws. The cities of Chesapeake and Virginia Beach include minimal zoning provisions in their charters and state that Chesapeake and Virginia Beach will follow the general laws of the state when it comes to zoning. Copies of the applicable provisions of the Chesapeake, Norfolk, and Virginia Beach Charters are included with this report.

In my review of Chapter 17, I noted many of the sections in it are similar to the

provisions in the Virginia Code, but much of the language used in Chapter differs from the language in comparable sections of the Code. Some of the differences result from the fact that many of the zoning provisions in Chapter 17 were adopted in 1948. Since that time there have been many revisions to the zoning laws in the Virginia Code that are not reflected in the City Charter.

My observations and comments regarding Chapter 17 are as follows:

Note: There are a number of references in Chapter 17 to the “master plan” but the term master plan is not used in Chapter 22 of Title 15.2 of the Virginia Code dealing with Planning, Subdivision of Land and Zoning. Instead of master plan, the Virginia Code uses the term “comprehensive plan” which can create some confusion when comparing the City Charter to the Virginia Code. Even though the City Charter and the Virginia Code use different terms, I am treating the master plan and the comprehensive plan as the same document and using the terms interchangeably.

- §17.01 of the City Charter which authorizes City Council to adopt a master plan for the City seems to be inconsistent with the provisions of §17.06 which gives the planning commission the authority to adopt the master plan and provides that City Council approves the plan that was adopted by the planning commission.

- §17.02 of the City Charter provides that in addition to the members of the planning commission who are appointed by City Council, one member shall be a member of the board of zoning appeals appointed by the board of zoning appeals, one member shall be the chief administrative officer or an officer or employee of the city designated by the chief administrative officer, and one member shall be a citizen member who is appointed by the mayor. §15.2-2212 of the Virginia Code provides that all the members of the planning commission shall be appointed by the local governing body.

- §17.05 of the City Charter gives the planning commission the authority to preserve historical landmarks and to control the design and location of statuary and other works of art which are or may become the property of the City. Normally this authority would rest with the governing body, not the planning commission. For example, see §15.2-1812 of the Virginia Code. The City may wish to revise §17.05 so it is consistent with the State Code.

- The provisions in §17.04 and §17.06 of the City Charter dealing with the adoption of the master plan by the planning commission are different than the provisions in §15.2-2223 of the Virginia Code dealing with the preparation of comprehensive plans by local planning commissions. §15.2-2223 goes into much more detail in describing the purpose of and what should be included in a comprehensive plan. §17.06 also gives the planning commission the authority to adopt the master plan and provides that City Council simply approves the plan that was adopted by the planning commission. §15.2-2223 of the Virginia Code provides that the local planning commission “shall prepare and recommend a comprehensive plan” and the “governing body shall adopt” the comprehensive plan. The language in §17.06 denies City Council the authority over the master plan/comprehensive plan that is exercised by other elected governing bodies throughout the state and gives such authority to an appointed body.

- §17.07 of the City Charter seems to be Richmond’s equivalent of §15.2-2232 of the Virginia Code which establishes the legal status of the comprehensive plan. However, the language in §17.07 is not consistent with the language in §15.2-2232. §15.2-2232 also does not contain the two-thirds voting requirement and the requirement that the planning commission

must act within sixty days that are contained in §17.07. Lastly, §17.07 gives the planning commission the authority to approve the “widening, extension, narrowing, enlargement, vacation or change in the use of streets and other public ways, grounds and places within the city as well as the acquisition by the city of any land within or without the city for public purposes or the sale of any land then held by the city shall be subject to similar approval.” There is nothing in the provisions of the Virginia Code that give a local planning commission the authority to approve such decisions. Section §17.07 gives the planning commission more authority over City Council than a planning commission typically exercises over a governing body.

- §17.10 of the City Charter seems to be Richmond’s equivalent of §15.2-2280, §15.2-2283, and §15.2-2284 of the Virginia Code which set forth the purposes for which zoning ordinances are adopted and administered. However, the language in §17.10 is not consistent with and is not as extensive as the language used in the Virginia Code.

- §17.11(a) of the City Charter requires that zoning regulations and restrictions shall be uniform within zoning districts. There is a similar requirement in §15.2-2282 of the Virginia Code.

- §17.11(b) of the City Charter authorizing City Council to authorize the issuance of special use permits is generally consistent with state law, but §17.11(b) also provides that City Council may not authorize a special use permit until the planning commission has conducted a public hearing to investigate the circumstances and conditions upon which the permit is to be authorized. There is no similar requirement for planning commission review in the Virginia Code. However, the special use process in §17.11(b) of the City Charter may be unique to Richmond and the City may wish to keep the current process in place.

- §17.12 of the City Charter provides that zoning decisions must be in accord with the provisions and not contrary to the comprehensive zoning plan. In several decisions the Virginia Supreme Court has held that comprehensive plans are “advisory guides” that do not bind a governing body and that a governing body can deviate from the comprehensive plan when the governing body determines it is appropriate to do so. §17.12 of the City Charter places more restrictions on the City than the law requires.

- The last paragraph in §17.14 of the City Charter seems to prohibit the City from repealing the designation of an area as a historic district. There is no such prohibition in the provisions of the Virginia Code dealing with historic districts.

- §17.15 of the City Charter allows twenty percent of the property owners in an area to protest certain zoning changes and provides that if such a protest is filed, the proposed changes shall not take place unless seven members of City Council vote in favor of the change. This is an unusual provision and seems contrary to §15.2-1427 of the Virginia Code which provides that as a general rule, an ordinance may be adopted by a majority of the members of a governing body who are present and voting at a meeting. However, there are some sections in the Virginia Code that require a super majority vote of a governing body in order to take certain actions (e.g., to sell a city’s public property, to issue bonds, etc.). It is within the purview of the Richmond Charter Review Commission to decide if this provision continues to serve the City’s needs.

- §17.16 of the City Charter creates two boards of zoning appeals, one to deal with the matters that are typically handled by a board of appeals and a second board of appeals to deal with matters relating to the preservation of the Chesapeake Bay. There may be a good reason to have two boards of zoning appeals, but two boards are not required by the Virginia Code.

- §17.19 of the City Charter dealing with appeals to the board of zoning appeals is generally consistent with the provisions of §15.2-2311 of the Virginia Code, but the provisions in §17.19 are not as comprehensive as the provisions in §15.2-2311.

- §17.20 of the City Charter dealing with the powers of the board of zoning appeals is not consistent with the provisions of §15.2-2209 of the Virginia Code. For example, §17.20 does not contain the findings that the Virginia Code requires a board of appeals to make in order to authorize a variance.

- §17.20(c) and (d) of the City Charter authorize the board of zoning appeals to permit the use of property in ways that are prohibited by the City's zoning ordinance and to permit various exceptions to various provisions of the zoning ordinance. These provisions, in effect, give the board of zoning appeals the authority to rezone property. §15.2-2309(5) of the Virginia Code says that a board of zoning appeals does not have the authority to rezone property, so §17.20(c) and (d) give the board of zoning appeals more authority than required by state law.

- § 17.21 of the City Charter dealing with decisions by the board of zoning appeals contains a number of requirements that are not required by §15.2-2312 of the Virginia Code. Including such additional requirements in the City Charter creates an opportunity for mistakes in and challenges to the board's decisions.

- §17.22 of the City Charter requires that a petition for an appeal from a decision of the board of zoning appeals must be "verified by affidavit." There is no requirement in §15.2-2314 of Virginia Code that a petition for an appeal must be verified by affidavit. However, the requirement in §17.22 that the petition must be verified by affidavit, does lend more formality to the appeal process.

- §17.23 and §17.24 of the City Charter dealing with appeals of decisions of the board of zoning appeals are not consistent with the provisions in §15.2-2314 of Virginia Code. Over the years the Virginia Supreme Court, in a number of cases, has addressed the appeals process and §17.23 and §17.24 do not reflect the guidance provided by the Supreme Court in those decisions.

- §17.26 of the City Charter establishes penalties for violations of the zoning ordinance. Enforcement actions and penalties for violating local zoning ordinances are dealt with in more detail in §15.2-2208 and §15.2-2209 of the Virginia Code.

As previously noted, in reviewing Chapter 17 of the City Charter, my priorities were simplification, consistency with state law, and avoiding potential challenges to zoning decisions that could result from inconsistencies between the Charter and state law. But I also wanted to identify any provisions in Chapter 17 that give Richmond special zoning powers that are not provided by general law.

Richmond has an older Charter so it is not surprising that there are a lot of zoning provisions in the Charter since there were fewer state laws dealing with zoning at the time Richmond's Charter was granted. However, more recent charters take the approach of relying on

state law for their zoning authority and not their charters. Chesapeake and Virginia Beach are examples of this approach, their charters contain minimal zoning provisions and simply state that they will follow the general laws of the state when it comes to zoning.

My recommendation is that Richmond follow the more recent approach and remove most of the zoning provisions contained in Chapter 17 from the City Charter. Having provisions in the City Charter that are inconsistent with state law creates confusion, increases chances of making mistakes, and potentially increases the chances of challenges to zoning decisions.

However, as previously noted, each city has its own personality and I recognize that the Richmond Charter Review Commission may place higher priorities on such things as maintaining a somewhat unique zoning process and staffs' familiarity with the current zoning process, etc. instead of the priorities I used in my review. Also, the Charter Review Commission may wish to preserve all or some of the unique provisions in Chapter 17, such as §17.11(b) giving City Council special powers regarding the issuance of special use permits.

Chapter 18. Acquisition of Property for Public Purposes

- In recent years the provisions in Title 25.1 of the Virginia Code regulating the use of eminent domain by local governments have undergone a number of changes and there are some provisions in Chapter 18 that are inconsistent with the provisions in Title 25.1 of the Virginia Code and Chapter 19 of Title 15.2 of the Virginia Code. However, I do not recommend that the City seek to amend Chapter 18 to make it consistent with Title 25.1 and Chapter 19 of Title 15.2.

§18.03 of the City Charter gives the City the right of "quick take." Under its quick take authority, the City becomes the owner of the property it is seeking to acquire for a public purpose once the City files the condemnation petition with the circuit court and deposits the estimated fair market value of the property with the court. At that point the City owns and can take possession of the property and begin the project. Most localities in Virginia do not have quick take authority and must wait until the conclusion of the condemnation process before starting work on a project. Given the hostility to eminent domain by the public in recent years, it is possible that if Richmond seeks to amend Chapter 18 the General Assembly could remove the quick take provision from the City Charter. Therefore, I recommend that the City not amend the provisions in Chapter 18. However, when initiating eminent domain proceedings, the City should follow the amendment process spelled out in Title 25.1 of the Virginia Code and Chapter 19 of Title 15.2 of the Virginia Code, not the eminent domain process set forth in Chapter 18.

Chapter 20. Miscellaneous Provisions

- §20.10 of Chapter 20 of the City Charter requiring the city to provide courtrooms and office space for constitutional officers could be removed from the City Charter. §15.2-1638 of the Virginia Code requires a locality to provide courthouses and facilities to accommodate the various courts and officials and §§15.2-1600 to 15.2-1637 require localities to provide facilities and benefits for constitutional officers.

- §20.11 of Chapter 20 of the City Charter providing that the City is not required to post a bond for the exercise of its rights could be removed from the City Charter. §15.2-1126 of the

Virginia Code provides that a municipal corporation does not have to post a bond as a condition precedent to the exercise of its rights.

Changes to Richmond's Election Districts

The members of the Richmond City Council are currently elected from nine election districts in the city. At its April 27 meeting the Richmond Charter Review Commission asked if it would be legal of the City to reduce the current number of Council Election Districts. After researching this matter, it is my opinion that there is no legal reason the City could not change the current election system if the City can demonstrate that there is a legitimate purpose for changing the current election system and that the new election system will not dilute the voting strengths the City's minority population enjoys under the current system.

In 1969 Richmond annexed a portion of Chesterfield County and the annexation reduced the City's minority population from 52% to 42%. Under the preclearance requirements of the Voting Rights Act, the annexation and the resulting changes to the City's election system had to be approved by the U.S. Justice Department or the Federal District Court for the District of Columbia. The City petitioned the Federal District Court for approval of its annexation. At the time of annexation, the members of City Council were elected at-large. As part of its petition, Richmond shifted from an at-large election system to a system of electing councilmembers from nine election districts: four election districts with substantial minority majorities, four election districts with substantial white majorities, and a ninth election district with 59% white and 41% minority population.

The Federal District Court did not approve the City's petition, and the City appealed the District Court's decision to the U.S. Supreme Court, *City of Richmond v. United States*, 442 U.S. 358 (1975). On appeal the Supreme Court found that Richmond's plan creating nine election districts satisfied the requirements of the Voting Rights Act because it fairly recognized the minority population's political potential. After making such finding, the Supreme Court remanded the case back to the District Court for further proceedings consistent with its decision.

A city can seek to change its election system when the demographic characteristics of the locality have changed. For example, a new census may show that the city's minority population has decreased throughout all or a portion of a city, which would justify changes in the election process.

Federal and state election laws would allow Richmond to change its current nine district election system. However, any changes to the current election system could be challenged on the grounds that the changes violate the provisions of the Civil Rights Act. In order to change the current election system, the City will have the burden of demonstrating that: (1) the changes to the current election system are not motivated by a racially discriminatory purpose, and (2) the new election system will not have a retrogressive effect, that is, the City's minority voters will not be "worse off" under the new election plan.

In the 2013 in the case of *Shelby County v. Holder*, 570 U.S. 529 (2013), the U.S. Supreme Court struck down the preclearance requirements of the Voting Rights Act. Consequently, any changes to Richmond's election system will no longer have to be approved by the U.S. Justice Department or the Federal District Court for the District of Columbia. However, in 2021 the Virginia General Assembly amended the Virginia Code to require that any locality that has a voting-age population containing two or more racial or ethnic groups, each constituting

at least 20 percent of the voting-age population must obtain preclearance approval from the Virginia Attorney General before making changes to its election districts. Any changes to Richmond's current election system will have to be approved by the Attorney General.

In addition to seeking preclearance approval from the Attorney General, the City will also need to review any order that was entered by the Federal District Court for the District of Columbia after the U.S. Supreme Court remanded the case back to the District Court for further proceedings. If the District Court ordered Richmond to implement the current system of nine election districts, the City would need to ask the District Court to amend or lift its order in order to make changes to the current election system.

If the City decides to pursue changes to the current election system, it should work with an election law attorney and a statistician to create an appropriate record to demonstrate that the new election system will not have a retrogressive effect and that the new election system will not dilute the voting strength the City minority population enjoys under the current election system.

I appreciate the opportunity to work with the City Attorney's Office on a very interesting project and hope this report will be of some assistance to the City Attorney's Office. If you have any questions concerning the report, please do not hesitate to contact me.

Sincerely,



Walter C. Erwin

PROVISIONS OF THE VIRGINIA BEACH CHARTER RELATING TO ZONING

Chapter 19. City Planning.

§ 19.01. Planning commission.

There shall be a city planning commission which shall consist of not less than five nor more than fifteen members, and shall be organized as provided by general law. All members of the commission shall be qualified voters of the city and shall be appointed by the council for terms of four years. (1962, c. 147)

§ 19.02. Functions of planning commission.

The planning commission shall be responsible for making recommendations to the council on all phases of city planning, including a master plan, zoning and subdivision control. It shall have the powers and duties provided by general law and such other powers and duties as may be assigned by the council. (1962, c. 147)

§ 19.03. Board of zoning appeals.

There shall be a board of zoning appeals which shall consist of five members appointed for three-year terms by the circuit court of the city or the judges thereof in vacation. (1962, c. 147)

§ 19.04. Powers of the board of zoning appeals.

The board of zoning appeals shall have all powers granted to boards of zoning appeals by general law. (1962, c. 147)

§19.05. Appeals from actions of the board of zoning appeals.

Appeals from any action of the board of zoning appeals may be taken to the circuit court of the city in the manner prescribed by general law. (1962, c. 147)

PROVISIONS OF THE CHESAPEAKE CHARTER RELATING TO ZONING

Chapter 12. City Planning.

§ 12.01. Planning department and director.

There shall be a planning department headed by a director who shall be appointed by the manager as provided in § 7.02. The planning director shall have the following responsibilities:

- A. The preparation of a comprehensive plan and its continued review and revision;
- B. To advise the city manager on the implementation of the comprehensive plan and other matters affecting the physical development of the city;
- C. To prepare such other reports, studies and evaluations as required by the city manager; and
- D. To advise the city planning commission in the exercise of its responsibilities and in connection therewith to provide necessary staff assistance. (1980, c. 717)

§ 12.02. City planning commission.

There shall be a city planning commission consisting of not less than five nor more than fifteen members appointed by the council for terms of four years from among the qualified voters of the city. No person shall be appointed to the planning commission for more than two consecutive four-year terms. Members of the commission shall hold no other city office. The commission shall make recommendations to the city manager and the city council on all matters affecting the physical development of the city, shall be consulted on the comprehensive plan as provided in § 12.05 and shall exercise all other responsibilities as may be provided by general law. (1980, c. 717)

§ 12.03. Board of zoning appeals; composition; appointment of members.

There shall be a board of zoning appeals which shall consist of seven members appointed for three-year terms by the judges of the circuit court. (1980, c. 717; 2012, cc. 194, 453)

§ 12.04. Same; powers.

The board of zoning appeals shall have all powers granted to boards of zoning appeals by general law. (1980, c. 717)

§ 12.05. Comprehensive plan.

- A. Content. The council shall adopt, and may from time to time modify, a comprehensive plan written in accordance with Title 15.1, Chapter 11 of the Code of Virginia, as amended, setting forth in graphic and textual form policies to govern the future physical development of the city.
- B. Adoption. Upon receipt from the planning commission of a proposed comprehensive plan or proposed modification of the existing plan, the council shall hold a public hearing on the proposed comprehensive plan or modification thereof and shall thereafter adopt it by resolution with or without amendment.

C. Effect. The comprehensive plan shall serve as a guide to all future council action concerning land use and development regulations, urban renewal programs and expenditures for capital improvements. (1980, c. 717)

CITY OF NORFOLK CHARTER RELATING TO ZONING

The Norfolk City Charter does not contain any provisions specifically dealing with zoning, it simply has the following reference to the state's general laws.

§ 136. General laws to apply.

All general laws of the State applicable to municipal corporations now in existence or hereafter enacted and which are not in conflict with the provisions of this charter or with ordinances or resolutions hereafter enacted by the council pursuant to authority conferred by this charter shall be applicable to the said city; provided, however, that nothing contained in this charter shall be construed as limiting the power of the council to enact any ordinance or resolution not in conflict with the Constitution of the State or with the express provisions of this charter. (1918, c. 34)