

CITY OF CHARLOTTESVILLE, VIRGINIA
CITY COUNCIL AGENDA



Agenda Date:	May 1, 2023
Action Required:	Adopt the ordinance by a four-fifths vote.
Presenter:	Andrew McRoberts, Sands Anderson PC
Staff Contacts:	Allyson Davies, Senior Deputy City Attorney
Title:	Continuity of Government during the Covid-19 Pandemic disaster; supplemental changes and ratification (1 reading with four-fifths vote; or 2 readings)

Background

In response to the COVID- 19 pandemic emergency, the City Council developed and voted on a series of ordinances to ensure that City operations could continue in accordance with Virginia Code § 15.2-1413. Virginia Code § 15.2-1413 states in relevant part, "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.... disaster."

Virginia Code § 15.2-1413 is a statutory provision dating back to the 1920s, enacted in response to the Spanish Flu pandemic and World War I. Since that time and through various Virginia Code recodifications, a locality has been authorized to adopt an ordinance to provide for a method to assure continuity of government in the event of a disaster such as the COVID-19 pandemic. This method may be adopted in lieu of normal procedures provided by general laws such as the Virginia Freedom of Information Act.

City Council adopted the continuity of government ordinances beginning March 25, 2020, in Ordinance # 20-049 and thereafter reenacted, amended and extended its continuity of government ordinances many times by Ordinances # O-20-117, # O-20-135, # O-21-053, # O 21-146, and finally by # O-22-029, which remained in effect until it expired on September 8, 2022. Thereafter, the City Council and the City Manager continued certain pandemic-indicated measures for some City public bodies, including virtual meetings consistent with the Virginia Freedom of Information Act ("FOIA"), such as Virginia Code §§ 2.2-3708.2 and 2.2-3708.3. The open public meeting requirements of FOIA allow properly claimed exemptions provided under that Act (e.g., Virginia Code §§ 2.2-3708.2, 2.2-3708.3 and 2.2-3711) or any other statute (e.g., Virginia Code §§ 15.2-1413, and 15.2- 2907(D)). The City's above referenced continuity of government ordinances allowed for the City to continue operations even while the pandemic made it unsafe to physically assemble. City Council, during the time period from March 25, 2020, through September 6, 2022, and many other City public bodies met virtually due to the danger to the public, staff and City Council.

On March 23, 2023, the Virginia Supreme Court issued an opinion in the case of Berry v. Board of Supervisors of Fairfax County (the "Berry Opinion"). The Berry opinion interpreted Virginia Code §

2.2-3708(A)(2) and the Fairfax County continuity of government ordinance which were applicable to the adoption of a Fairfax County zoning ordinance under the facts of that case. The Court held that the remedy for a violation of FOIA for decisions not authorized by a continuity of government ordinance or other authorized exception is that the vote taken is void ab initio.

This decision and the reasoning were unexpected and suggested a sudden shift in what was otherwise well-understood and well-settled law. The Berry Opinion is not yet final. It is currently under reconsideration by the Virginia Supreme Court. Several local government organizations and state-wide non-profits are raising an issue with the Berry Opinion's holding at this time. During this period of uncertainty, the City seeks to clarify their previous continuity of government ordinances to authorize and ratify the actions taken by the City Council and its various Boards and Commissions during the pandemic disaster.

Therefore, the attached ordinance is provided to achieve this goal and provide for the City of Charlottesville and its citizens a degree of certainty for however long the Berry Opinion remains under consideration. There are multiple possible outcomes from a revised Berry Opinion that could impact the effectiveness of the attached Ordinance. However, at the current time, the clarification of the city's various continuity of government ordinances and the City Council's ratification, in an in-person public meeting, of the actions taken during the virtual public meetings can offer a greater degree of certainty over the actions taken by the City during the pandemic.

The attached ordinance is intended to provide a remedial method by which, if FOIA did not permit the City's public bodies to meet in excess of then-applicable law, alternative, flexible procedures would be available to allow the work of government to continue unabated and to protect the public health and that of our citizens, staff and the members of the public bodies.

Discussion

During the pandemic, the City did take steps to provide alternative means for public communication and participation in city business. The public was given additional access to public meetings virtually through the internet and other means, which expanded and increased public participation opportunities. The access to public meetings and opportunities afforded citizens via virtual choices for input expanded opportunity for the Community to be part of City meetings. The City, from September 8, 2022, onward, provides in person access to Council meetings under certain safeguards and conditions as well as virtual opportunities. During those times, City Council and other City public bodies conducted the important, continuing work of local government and acted to serve the good of the community, notwithstanding the ongoing emergency pandemic and public health concerns.

The Berry Opinion appears to be in conflict with the long-standing precedent of the Virginia Supreme Court that holds "when a statute creates a right and provides a remedy for the vindication of that right, then that remedy is exclusive unless the statute says otherwise." *Concerned Taxpayers of Brunswick Cnty. v. Cnty. of Brunswick*, 249 Va. 320, 330, 455 S.E.2d 712, 717–18 (1995), quoting *Vansant & Gusler, Inc. v. Washington*, 245 Va. 356, 360, 429 S.E.2d 31, 33 (1993) (quoting *School Bd. v. Giannoutsos*, 238 Va. 144, 147, 380 S.E.2d 647, 649 (1989)). Like the Procurement Act and the other statutes discussed in these cases, FOIA and its rights did not exist at common law, and "confers certain rights and obligations upon citizens of the Commonwealth, nongovernmental contractors, and governmental entities." See *W.M. Schlosser Co. v. Board of Supervisors*, 245 Va. 451, 456, 428 S.E.2d 919, 922 (1993) (Virginia Public Procurement Act). This rule applies whenever

the rights and obligations did not exist in the common law and were created through a statutory scheme. In *Concerned Taxpayers and W.M. Schlosser Co.* the Procurement Act was involved; in the *Berry Opinion*, FOIA was involved, but the same long-standing rule should apply in any case involving an alleged violation of FOIA.

The *Berry Opinion* has caused uncertainty regarding the validity of actions of City Council and other City public bodies during the Covid-19 pandemic emergency. For the City's citizens, businesses, property owners, and visitors to rely upon the certainty and finality of the actions of the City Council and the other City public bodies for decisions, investments, purchases, and other actions and behavior, it is important to try and take any available actions.

The City Council has the power to adopt retroactive legislation such as this Ordinance. As a legislative power, retroactive adoption has been upheld or referenced in such authorities as *Fallon Florist v. City of Roanoke*, 190 Va. 564 (1950)(retroactive tax ordinance upheld as legal and constitutional); *Gallagher v. Stathis*, 186 Va. 444 (1947)(local building code ordinance stated it would not have retroactive effect unless expressly stated so was not retroactive); *Chesterfield Civic Ass'n v. Board of Zoning Appeals of Chesterfield County*, 215 Va. 399 (1974) (ordinance held not to be retroactive but referencing the general rule on retroactivity that legislation is presumed not to be retroactive unless there is an express intent otherwise); *Barton v. Town of Middlesburg*, 27 Va. Cir. 20 (Loudoun Cir. 1991)(recognizing the general rule that a local legislature can make an ordinance retroactive by clear expression of intent, but holding the ordinance in question was not retroactive); *City of Virginia Beach v. Octo, Inc.*, 30 Va. Cir. 507 (Va. Beach Cir. 1981) (recognizing the potential for the ordinance to be retroactive, but holding it was not in this case); 1986-87 Va. A.G. 242 (localities may adopt retroactive civil ordinances so long as no vested rights are disturbed or contract violated); 1972-73 Va. A.G. 251 (local retroactive line of duty act ordinance valid); see also 6 *McQuillen, Municipal Corporations* § 20.70 (1980); 62 *CJS Municipal Corporations* § 443(c) (1949). Adoption of the Ordinance by City Council is in line with long established precedent.

The method authorized by Virginia Code § 15.2-1413 and this Ordinance to address the pandemic disaster is a multi-layered method of various, more flexible procedures in addition to what FOIA authorized. The pandemic disaster went through various stages and took multiple turns. The City Council and public bodies were expected to, and did, in good faith, continue local government for the good of the community, while attempting to maintain health and safety through virtual meetings. It is important to clearly reaffirm the methods and procedures taken during the emergency in a now, safe, public, in-person meeting. This Ordinance is to be retroactive and remedial. If adopted, it is a remedial effort to provide certainty in response to the disaster caused by the COVID-19 pandemic, as recognized by national, state and local authorities. It promotes public health, safety and welfare, and is consistent with the laws of the Commonwealth of Virginia, the Constitution of Virginia and the Constitution of the United States of America.

Alignment with City Council's Vision and Strategic Plan

Adoption of this Continuity of Government and Ratification Ordinance is consistent with the City's vision to be flexible and progressive in anticipating and responding to the needs of our citizens.

Community Engagement

This proposed ordinance is a ratification of actions taken during virtual meetings under the Covid-19 emergency. Community engagement has already occurred with respect to the various actions taken by the City Council during the pandemic.

Budgetary Impact

There is no new budgetary impact on the adoption of this ordinance. All of the actions ratified by this ordinance already occurred during the Covid-19 pandemic.

Recommendation

Staff recommends adoption of this ordinance.

Alternatives

The City Council could decline to adopt this ordinance and wait to see what the final Berry Opinion holds with respect to actions taken at virtual meetings during the Covid-19 pandemic.

Attachments

1. Retroactive COG Ordinance - FINAL 4864-4892-6047 v