

To: Martinsburg City Council

From: Floyd M. Sayre, III
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Date: March 20, 2014

Subject: Home Rule Application

Following is a draft of the Home Rule Plan. The completed Plan must be submitted one or before June 1, 2014. Prior to submission of the Plan, the City must provide 30 day notice of public hearing in a Class II legal ad, provide a copy of the plan to be made available for public inspection 30 days prior to the public hearing, conduct a public hearing, and adopt an ordinance authorizing submission of the plan to the Municipal Home Rule Board. In that light, on March 25, the Council will hold a special council meeting to approve the proposed Plan, after which a notice of public hearing Class II legal ad will run. On April 29, the Council will hold a special council meeting to conduct a public hearing on the Plan. Subsequently, on May 8 and May 20, the ordinance will be read to authorize the Plan. Finally, the Plan will be submitted prior to June 1.

Specific Problems and Solutions to be addressed by Martinsburg’s Home Rule Plan:

A. Grant of authority to Martinsburg City Code Enforcement Officials to immediately issue citations for external sanitation violations and common nuisances.

1. Problem: Presently, City code enforcement officials are unable to issue citations “on the spot” for external sanitation violations and common nuisances, but rather are required to send notices and provide an opportunity to respond. This requires additional manpower and the lack of immediate citation power results in decreased compliance by property owners.

2. Authority: W.Va. Code § 8-12-16 allows municipalities to adopt ordinances regulating the repair, closing, demolition, etc. of dwellings or buildings unfit for human habitation. Additionally, municipalities may adopt ordinances requiring the owner of any such dwelling or building to pay for the costs of repairs, alterations, improvements, demolition, etc. The municipality then may file a lien against the real property for the costs incurred by the municipality, and file a civil action for such costs and reasonable attorneys’ fees.

Additionally, W.Va. Code § 8-12-5(23) vests municipalities with the authority to, by ordinance or resolution, provide for the elimination of hazards to public health and safety and abate or cause to be abated anything which a majority of the governing body finds to be a public nuisance, but does not provide authority for granting citation powers to code enforcement officials.

3. Solution: The City will enact an ordinance providing its code enforcement officers the authority to issue “on the spot” citations for certain violations. This citation power will extend to sanitation, drainage, sidewalks in disrepair, high weeds, grass, or both, graffiti, exterior garbage accumulation, open storage in residential districts, and nonresident recreational vehicles. These citations may be issued to the owner, lessee, sublessee, tenant, occupant, or agent or manager thereof, presently having control over the property in question.

4. Other Notes: H.B. 4461, H.D., 2012 Reg. Sess. (W.Va. 2012) was intended to provide a citation process for municipalities to address certain external sanitation and common nuisance violations but never came to a vote.

Charleston has provided similar authority to its code enforcement officers and reports faster compliance with external sanitation violations and common nuisances. *See* Special Report: Municipal Home Rule Pilot Program, pg. 12. Of sixty-three citations issued, two were appealed to Municipal Court.

Presently, Martinsburg, W.Va., Code § 1101.08(a) vests responsibility for any nuisance maintained or harbored on property with any person having control over such property, whether he be the owner, lessee, sublessee, tenant, occupant, or agent or manager in charge for such owner, lessee, sublessee, tenant, or occupant thereof.

B. Liens for Actions Taken in Regard to Eyesores and Dilapidated Buildings.

1. Problem: The City has the ability to repair, alter, or demolish property and/or mow overgrown grass, but is limited to sending a bill to the property owner to attempt to recoup the money expended taking such action, leaving such bills often unpaid.

2. Authority: W.Va. Code § 8-12-16 governs the adoption of ordinances regulating the repair, closing, demolition, etc., of dwellings or buildings unfit for human habitation. It allows every municipality to file a lien against real property for an amount that reflects all costs incurred by the municipality for repairing, altering, improving, closing, demolishing, etc. but requires that a lawsuit be filed in order to obtain such lien.

Additionally, W.Va. Code § 8-12-5(23) vests municipalities with the authority to, by ordinance or resolution, provide for the elimination of hazards to public health and safety and abate or cause to be abated anything which a majority of the governing body finds to be a public nuisance, but does not provide any authority for filing liens against property for fees incurred in removing such hazards or nuisances.

3. Solution: The City may, after due notice, repair, alter, or demolish property, mow overgrown grass, and collect unlawful accumulations of garbage and rubbish, and, without court approval, place a lien on the property for the amount expended by the City in taking such action.

C. Contracts between Martinsburg and Other Jurisdictions.

1. Problem: If the City of Martinsburg wishes to contract with another jurisdiction, it must go through the process of enacting an ordinance, requiring several readings of a proposed ordinance at Council meetings and delaying the entry into such contract by several weeks.

2. Authority: W.Va. Code § 8-11-3(10) indicates that, except where otherwise provided by code, actions of a municipality in providing for a contractual or other agreement with another jurisdiction shall be by ordinance.

3. Solution: The City would no longer be subject to the requirement set forth in W.Va. Code § 8-11-3(10) that it enact ordinances to enter into contracts with other jurisdiction, but rather may contract with another jurisdiction via resolution, saving time expended by going through the process of enacting an ordinance and expediting receipt by the City of the services or agreement obtained through such contract.

4. Other Notes: By H.B. 4312, H.D., 2012 Reg. Sess. (2012), the House attempted to pass a bill amending W.Va. Code § 8-11-3 by removing subsection 10, but the bill appears to have died in the Judiciary Committee. Charleston reports that, as a result of its proposal to allow contracts with other jurisdictions via resolution, thirty-five contracts have been approved at least two weeks faster than would have otherwise occurred. *See* Special Report: Municipal Home Rule Pilot Program, pg. 13.

D. Delinquent Fees Collection.

1. Problem: While the City of Martinsburg may presently issue liens for delinquent Police, Fire, and Street fees, it is unable to issue liens for various other City fees.

2. Authority: W.Va. Code § 8-13-13(a) allows a municipality which furnishes any essential or special municipal service, including, but not limited to, police and fire protection, parking facilities on the streets or otherwise, parks and recreational facilities, street cleaning, street lighting, street maintenance and improvement, sewerage and sewage disposal, and the collection and disposal of garbage, refuse, waste, ashes, trash and any other similar matter, to provide by ordinance the installation, continuation, maintenance, etc. or the service, regulate such service, and impose reasonable rates, fees and charges.

However, subsections (c) and (d) provide that such municipality may only file liens on real property located within the municipal corporate limits for unpaid and delinquent fire, police or street fees. Specifically, W.Va. Code § 8-13-13(d) provides that the municipality “shall not” have a lien on any property as security for payments due unless such payments relate to fire, police, or street fees.

3. Solution: The City will pass an ordinance permitting it to issue liens for various categories of delinquent city fees, allowing it to collect funds owed to the City by property owners. This ordinance will potentially tie into the ability of City officials to issue citations for certain violations as contemplated in Section A, above, and to take action in regard to eyesores and dilapidated buildings, as contemplated in Section B, above, providing a greater likelihood of receiving compensation for taking action to address such detrimental issues.

4. Other Notes: Charleston, Huntington, and Wheeling reported that implementation of the authority to issue liens for delinquent city fees provided collection of significant amounts of delinquent fees and increased compliance with payment of fees assessed. See Special Report: Municipal Home Rule Pilot Program, pp. 12-14. Specifically, Wheeling has reported the issuance of several dozen liens for property maintenance, such as mowing lawns.

F. Disposition of City Property Without Auction.

1. Problem: Presently, the City may only sell property by auction for fair and adequate consideration, and only lease property for fair and adequate consideration. The inability to sell property without auction or to lease property with less than “fair and adequate consideration” prevents the City from entering into transactions that could fill vacant buildings, attract businesses, provide revenue, and encourage the use of City properties, whether it be by private sale to an interested party, by lease for less than fair market value to a private entity attempting to develop business in the area, or by lease to a nonprofit providing a service for the public good.

2. Authority: Under W.Va. Code § 8-12-18, except in limited circumstances involving sales to the United States, or a state or instrumentality thereof, municipalities may only sell their real or personal property for fair and adequate consideration at public auction with sufficient legal advertisement. Similarly, municipalities may lease real or personal property, but only for fair and adequate consideration by resolution of the municipality’s governing body.

3. Solution: The City will pass an ordinance: 1) allowing the sale of real and personal property by the City at fair market value to private purchasers without auction in such a manner that promotes economic development or provides a service for the public good,, 2) allowing the lease of real and personal property by the City to private lessees for less than fair market value if the private lessees will use the property in such a manner that promotes economic development or provides a service for the public good, 3) allowing the sale of real and personal property by the City at less than fair market value to nonprofit purchasers without auction, and 4) allowing the lease of real and personal property by the City at less than fair market value to nonprofit lessees.

4. Other Notes: Charleston reported that the ability to dispose of its property without auction allowed it to directly sell a plot of connecting land to a Kroger store providing the opportunity for a \$9.6 million expansion. Similarly, the ability for the City to sell or lease property when approached by interested buyers or lessees without subjecting the City or prospective purchasers/lessees to the risks inherent to a public auction will provide greater opportunity for economic growth within the City and help to minimize vacant properties.

G. Purchasing Tax Liens on Properties Subject to Delinquent Property Taxes; Right of Redemption by the City.

1. Problem: Many properties within the Municipal Boundaries that are habitually dilapidated or in violation of municipal and building codes are also subject to delinquent tax liens that are sold pursuant to West Virginia Code § 11A-3-1 *et seq.* Many times the purchasers of these tax liens will allow the violations and dilapidated conditions to continue to exist, and many times will continue to allow the property taxes to go delinquent multiple times without correcting the problems. Also, on properties on which the City has been required to take corrective actions or for which the owners owe delinquent fees, the associated liens filed by the City are subject to foreclosure under West Virginia Code § 11A-3-1 *et seq.*, eliminating an opportunity for the City to obtain payment of funds due under those liens.

2. Authority: Under W.Va. Code §11A-3-56(b), “[a]ny person who, by reason of the fact that no provision is made for partial redemption of the tax lien on real estate purchased by an individual, is compelled in order to protect himself to redeem the tax lien on all of such real estate when it belongs, in whole or in part, to some other person, shall have a lien on the interest of such other person for the amount paid to redeem such interest.”

3. Solution: The City will pass an ordinance: 1) allowing the purchase by the City of tax liens for property within the City of Martinsburg, 2) providing that, for properties on which the City of Martinsburg has placed liens for municipal services or payment due for corrective actions for code violations, the City, subject to any right of the property owner to redeem, be allowed to redeem the subject property, and, if the property is not redeemed by the owner or any other party who has a right to redeem, that the Auditor of the State of West Virginia convey the subject property to the City of Martinsburg, upon payment of the amount required under W. Va. Code § 11A-3-23.

4. Other Notes: This will allow the City of Martinsburg to recover amounts expended by the City for services and corrective actions, and allow the City to convert these otherwise nonproductive properties into assets of the City that can be used for development.

H. Fire Marshals.

1. Problem: Previously, fire marshals were deputized by the State Fire Marshal to inspect potential issues and issue citations. The State Fire Marshal has discontinued training and deputizing City fire marshals, and the City needs a means to provide its fire marshals with inspection and citation authority.

2. Authority: Title 87 of the West Virginia Code of State Regulations provides authority for the State Fire Marshal and his deputies to inspect potential violations and order that they be corrected. However, our fire marshals no longer fall under its purview. W.Va. Code § 8-12-15 allows the City to provide, by ordinance, for the entrance and inspection of private premises to aid in the enforcement of state law or municipal ordinances.

3. Solution: The City will enact an ordinance providing its fire marshals with the ability to both inspect and also issue citations for fire code violations.

I. Ability for the Martinsburg Police Department to exercise the same authority as the ABCA.

1. Problem: The City Police essentially have the same authority over bars as they would over any other private dwelling. Conversely, as a requirement of the bars' licensure, the ABCA has considerably greater authority, including, for example, the ability to run stings to determine whether underage patrons are being served. The City wishes to be able to act with the same authority as the ABCA. Additionally, the City wishes to regulate other aspects of the operation of private clubs, such as the hours in which bars may serve alcohol.

2. Authority: For example, W. Va. Code St. R. 175-2-4.4.4 requires a licensee to, at reasonable times, permit the immediate inspection of licensed premises by the Commissioner to ensure that the laws and rules of the State of West Virginia are enforced, and upon presentation of credentials, the licensee must allow the Commissioner immediate access to the licensed premises. Much like any private establishment, the City Police have no right of inspection or right of entry without probable cause.

3. Solution: The City will enact ordinances granting to its police force authority identical to that of the ABCA, allowing the City Police, among other actions, to conduct stings regarding underage drinking in private clubs. Additionally, the City may enact an ordinance regulating the hours in which alcohol may be served in such establishments.

J. Sales Tax.

1. Problem: Presently, if the City wishes to enact a sales tax, it must completely eliminate its municipal business and occupation ("B&O") tax. Complete elimination of the B&O tax would cripple the City's budget. However, the ability to lower its B&O tax by a reasonable amount while enacting a sales tax provides both the City with an additional revenue source and a break for certain businesses.

2. Authority: W.Va. Code § 8-13C-1 *et seq* contemplates the imposition of a sales tax by municipalities either for pension relief or as an "alternative municipal sales tax" at a rate not to exceed one percent. However, a municipality may only impose such a sales tax if it completely eliminates its B&O tax. W.Va. Code § 8-13C-4(b). Under W.Va. Code § 8-1-5a(k)(6), municipalities participating in the Municipal Home Rule Pilot Program do not have the authority to pass an ordinance under Home Rule pertaining to taxation, except that a participating municipality may enact a municipal sales tax up to one percent if it *reduces or eliminates* its municipal B&O tax.

3. Solution: The City proposes to reduce its B&O tax on wholesalers and retailers by ten percent and eliminate the B&O tax on amusement businesses, while imposing a one percent sales tax on all taxable sales under the West Virginia Code. This proposal will generate an estimated additional \$2.4 million in revenue to the City. While other scenarios incorporating a greater reduction in B&O tax could potentially generate greater revenue for the City, this proposal allows the City to proceed cautiously by reducing or eliminating a few categories of B&O tax. If the City, as expected, sees substantially increased revenues, it can look in the future at further reducing the B&O tax on various categories.