



# COMMONWEALTH of VIRGINIA

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Martin Crim, Esquire  
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Dear Mr. Crim:

I am responding to your request for an official advisory Opinion in accordance with § 2.2-505 of the *Code of Virginia*.

## Issues Presented

You inquire whether a provision in Article III, § 1(4) of the Charter for the Town of Haymarket ("Charter"),<sup>1</sup> which allows the Haymarket Town Council to expel a member with the concurrence of two-thirds, is constitutional. You inquire further whether §§ 24.2-230 through 24.2-238, which relate to the removal of a local elected officers, supersede Article III, § 1(4) of the Charter. Lastly, you inquire whether the mayor may vote in expulsion proceedings, and whether the removal of a council member requires the concurrence of two-thirds of all voting members, or only of those present for the vote to expel.

## Response

It is my opinion that the provision in Article III, § 1(4) of the Charter, which allows the Town Council to expel a member by a two-thirds vote, is a constitutional exercise of legislative power. Sections 24.2-230 through 24.2-238, which relate to the removal of local elected officers, do not supersede this provision of the Charter. Further, the mayor may not vote in expulsion proceedings, and the concurrence of two-thirds of all council members eligible to vote is required in order to remove a council member.

## Applicable Law and Discussion

### I. THE CONSTITUTIONALITY OF THE CHARTER PROVISION ALLOWING EXPULSION BY TWO-THIRDS VOTE

Article III, § 1(4) of the Charter provides that "[t]he council shall judge of the election, qualification, and returns of its members; may fine them for disorderly conduct, and, with the concurrence of two-thirds, expel a member."<sup>2</sup> The threshold inquiry is whether this provision is a constitutional

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<sup>1</sup> CHARTER FOR THE TOWN OF HAYMARKET, VA., art. III, §1(4), available at <http://dls.virginia.gov/charters/Haymarket.pdf>.

<sup>2</sup> *Id.*; see 1950 Va. Acts ch. 540.

exercise of legislative authority. “It is well settled in Virginia that the State Constitution does not grant powers to the legislature but, instead, restricts powers which otherwise are practically unlimited.”<sup>3</sup> The General Assembly may enact any law that is not prohibited by the United States or Virginia Constitutions.<sup>4</sup> The United States and Virginia Constitutions do not expressly prohibit the General Assembly from granting power to a local legislative body to discipline or expel one of its members.<sup>5</sup>

Instead, the Constitution of Virginia explicitly grants the General Assembly certain powers of oversight over towns and other municipal corporations, including the power to delegate governmental powers to those bodies. In particular, Article VII, § 2 of the Constitution of Virginia establishes that the General Assembly “shall provide *by general law* for the organization, government, powers, change of boundaries, consolidation, and dissolution of counties, cities, towns, and regional governments.”<sup>6</sup> In addition, Article VII, § 2 of the Constitution of Virginia establishes that the General Assembly “may . . . provide *by special act* for the organization, government, and powers of any county, city, town, or regional government.”<sup>7</sup>

General law provides that

*A municipal corporation shall have and may exercise all powers which it now has or which may hereafter be conferred upon or delegated to it under the Constitution and laws of the Commonwealth and all other powers pertinent to the conduct of the affairs and functions of the municipal government, the exercise of which is not expressly prohibited by the Constitution and the general laws of the Commonwealth, and which are necessary or desirable to secure and promote the general welfare of the inhabitants of the municipality . . . .*<sup>[8]</sup>

A town is a “municipal corporation” pursuant to the provisions of § 15.2-102. Accordingly, pursuant to general law, the Town of Haymarket is authorized to exercise all powers it now possesses under the laws

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<sup>3</sup> 1983-84 Op. Va. Att’y Gen. 176, 177; *see* VA. CONST. art. IV, § 14; *Fairfax Cnty. Indus. Dev. Auth. v. Coyner*, 207 Va. 351, 355, 150 S.E.2d 87, 91 (1966); *Lewis Trucking Corp. v. Commonwealth*, 207 Va. 23, 29, 147 S.E.2d 747, 751-52 (1966); *Morgan v. Commonwealth*, 168 Va. 731, 736-37, 191 S.E. 791, 793 (1937).

<sup>4</sup> *FFW Enters. v. Fairfax Cnty.*, 280 Va. 583, 590, 701 S.E.2d 795, 800 (2010) (quoting *Dean v. Paolicelli*, 194 Va. 219, 227, 72 S.E.2d 506, 511 (1952)). Furthermore, “[t]here is no stronger presumption known to the law than that which is made by the courts with respect to the constitutionality of an act of Legislature.” *Whitlock v. Hawkins*, 105 Va. 242, 248, 53 S.E. 401, 403 (1906). The Supreme Court of Virginia “will not invalidate a statute unless that statute clearly violates a provision of the United States or Virginia Constitutions.” *Marshall v. N. Va. Transp. Auth.*, 275 Va. 419, 427, 657 S.E.2d 71, 75 (2008).

<sup>5</sup> I note in this regard that “a legislative body’s discipline of one of its members is a core legislative act.” *Whitener v. McWatters*, 112 F.3d 740, 741 (4th Cir. 1997); *see also Pine v. Commonwealth*, 121 Va. 812, 825, 93 S.E. 652, 655-56 (1917); 1980-81 Op. Va. Att’y Gen. 186, 187. This legislative power is the “primary power by which legislative bodies preserve their institutional integrity without compromising the principle that citizens may choose their representatives.” *Whitener*, 112 F.3d at 744 (internal quotation marks omitted) (citing *Powell v. McCormack*, 395 U.S. 486, 548 (1969)). Because the discipline of members of the legislature is a core legislative function, legislators may be afforded total immunity from suits alleging violations of procedural due process guarantees in disciplinary proceedings. *See id.* at 741. Moreover, because the Charter may be applied in a manner that upholds procedural due process guarantees, every reasonable doubt regarding its constitutionality must be resolved in its favor. *See Marshall*, 275 Va. at 428, 657 S.E.2d at 75 (citing *Hess v. Snyder Hunt Corp.*, 240 Va. 49, 53, 392 S.E.2d 817, 820 (1990)).

<sup>6</sup> VA. CONST. art. VII, § 2 (emphasis added).

<sup>7</sup> *Id.* (emphasis added).

<sup>8</sup> VA. CODE ANN. § 15.2-1102 (2012) (emphasis added).

of the Commonwealth, including all powers granted by special acts of the legislature.<sup>9</sup>

By special act, the General Assembly enacted the Charter for the Town of Haymarket, including the provision about which you inquire.<sup>10</sup> This provision mirrors the provisions in Article IV, § 7 of the Constitution of Virginia, and Article I, § 5 of the Constitution of the United States, which permit each house of the General Assembly and Congress, respectively, to expel a member with the concurrence of two-thirds.<sup>11</sup> In addition, it conforms to legislative practice inasmuch as the General Assembly has enacted several other town charters expressly permitting a town council, with the concurrence of two-thirds, to expel a member.<sup>12</sup>

Accordingly, I conclude that the provision in Article III, § 1(4) of the Haymarket Town Charter that allows the Town Council to expel a member with the concurrence of two-thirds is a constitutional exercise of legislative power, and the Town Council is authorized thereby to exercise such power.

## II. THE STATUTORY SUPERSESION OF THE CHARTER PROVISION

You further inquire whether §§ 24.2-230 through 24.2-238 of the *Code of Virginia*, which relate to the method and grounds for removal of local elected officers, supersede Article III, § 1(4) of the Charter.<sup>13</sup> It is well-established that “[t]he implied repeal of an earlier statute by a later enactment is not favored.”<sup>14</sup> “There is a presumption against a legislative intent to repeal where the later statute does not amend the former or refer expressly to it.”<sup>15</sup> In addition, “where the subsequent general law and prior special law, charter or ordinance provisions do not conflict, they both stand.”<sup>16</sup> Moreover, the legislature may enact provisions in town charters that confer “rights and privileges different from, and in addition to,

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<sup>9</sup> The laws of the Commonwealth include both its general laws and special acts. *See* VA. CONST. art. VII, § 2.

<sup>10</sup> *See* 1950 Va. Acts ch. 540 (establishing the Charter for the Town of Haymarket). The General Assembly last amended the Charter in 1972, with no change to the pertinent provision. *See* 1972 Va. Acts ch. 46.

<sup>11</sup> *See* VA. CONST. art. IV, § 7 (“Each house shall judge of the election, qualification, and returns of its members, may punish them for disorderly behavior, and, with the concurrence of two-thirds of its elected membership, may expel a member.”); U.S. CONST. art. I, § 5 (“Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.”).

<sup>12</sup> *See, e.g.*, CHARTER FOR THE TOWN OF AMHERST, VA., art. III, § 1(4), *available at* <http://dls.virginia.gov/charters/Amherst.pdf>; CHARTER FOR THE TOWN OF BOYCE, VA., § 5(2), *available at* <http://dls.virginia.gov/charters/Boyce.pdf>; CHARTER FOR THE TOWN OF CHASE CITY, VA., § 4(5), *available at* <http://dls.virginia.gov/charters/ChaseCity.pdf>; CHARTER FOR THE TOWN OF CHATHAM, VA., § 4(5), *available at* <http://dls.virginia.gov/charters/Chatham.pdf>; CHARTER FOR THE TOWN OF IRVINGTON, VA., art. III, § IV, *available at* <http://dls.virginia.gov/charters/Irvington.pdf>. In previous years, the General Assembly expressly established by general law the power of a town council to discipline its members through former § 15-423, which provides in relevant part: “The council of a town shall judge of the election, qualification, and returns of its members, may fine them for disorderly behavior and with the concurrence of two-thirds, expel a member.” (Former § 15-423 was repealed in 1962. *See* 1962 Va. Acts ch. 623.)

<sup>13</sup> I note that the General Assembly enacted Article III, § 1 of the Charter in 1950, prior to the enactment of VA. CODE ANN. § 24.2-230 (2011) and §§ 24.2-232 through 24.2-238 (2011 & Supp. 2014). *See* 1950 Va. Acts ch. 540; 1975 Va. Acts. ch. 595.

<sup>14</sup> *See, e.g.*, *Country Vintner, Inc. v. Louis Latour, Inc.*, 272 Va. 402, 413, 634 S.E.2d 745, 751 (2006) (quoting *Sexton v. Cornett*, 271 Va. 251, 257, 623 S.E.2d 898, 901 (2006)).

<sup>15</sup> *Id.* (quoting *Sexton v. Cornett*, 271 Va. 251, 257, 623 S.E.2d 898, 901 (2006)).

<sup>16</sup> *Scott v. Lichford*, 164 Va. 419, 423, 180 S.E. 393, 394 (1935) (internal quotation marks omitted); *see* 1996 Op. Va. Att’y Gen. 33, 35.

to, those conferred by general statutes.”<sup>17</sup> Accordingly, “when there is a conflict in the provisions of a special or local act and the general law on the subject[,] the special or local act is controlling.”<sup>18</sup>

The General Assembly has not provided expressly that §§ 24.2-230 through 24.2-238 constitute the sole method or grounds for removal of an elected, local officer. Moreover, §§ 24.2-230 through 24.2-238, unlike other provisions within Title 24 of the Code, do not amend or expressly refer to any charter provisions.<sup>19</sup> Absent language amending or expressly referring to separate charter provisions, §§ 24.2-230 through 24.2-238 do not conflict with Article III, § 1(4) of the Charter. Even if a conflict existed, §§ 24.2-230 through 24.2-238, which are general laws, could not be construed as superseding Article III, § 1(4) of the Charter, which is a special act.<sup>20</sup>

Accordingly, §§ 24.2-230 through 24.2-238 of the *Code of Virginia*, which relate to the removal of a local elected officer, do not supersede Article III, § 1(4) of the Charter.

### III. THE VOTE REGARDING THE REMOVAL OF A COUNCIL MEMBER

Lastly, you inquire whether the mayor may vote in expulsion proceedings, and whether the removal of a council member requires the concurring votes of two-thirds of all council members, or only those present for the vote to expel.

Article III, § 1(4) of the Charter provides that “[t]he council shall judge of the election, qualification, and returns of its members; may fine them for disorderly conduct, and, with the concurrence of two-thirds, expel a member.”<sup>21</sup> With respect to the role of the mayor in expulsion proceedings, Article III, § 1(2) of the Charter states that “the mayor and councilmen shall constitute the Town council.”<sup>22</sup> This section deems the mayor a member of the council and therefore subject to the removal provision. Nonetheless, despite making him a member, the Charter explicitly prohibits the mayor from voting except to break a tie, stating, “The Mayor shall have no right to vote in the council, except in case of a tie he shall have the right to break the same by his vote.”<sup>23</sup> The Charter provides for six councilmen who are eligible to vote.<sup>24</sup> Because the removal of a member requires the concurring vote of two-thirds, there could not be a tie. That is, if there are four votes to expel, the member is expelled. If there are fewer than

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<sup>17</sup> See *City of Colonial Heights v. Loper*, 208 Va. 580, 585-86, 159 S.E.2d 843, 847 (1968) (quoting *Ransone v. Craft*, 161 Va. 332, 340, 170 S.E. 610, 613 (1933)); see also § 15.2-1103 (2012) (providing that the legislature may confer, by municipal charter, powers in addition to those conferred by general statute); *Fallon Florist, Inc. v. City of Roanoke*, 190 Va. 564, 574, S.E.2d 316, 321 (1950); *City of Portsmouth v. Weiss*, 145 Va. 94, 107, 133 S.E. 781, 785 (1926).

<sup>18</sup> *Powers v. Cnty. Sch. Board*, 148 Va. 661, 669, 139 S.E. 262, 264 (1927); see also *Scott*, 164 Va. at 423-24, 180 S.E. at 395 (quoting *S. & W. Ry. Co v. Commonwealth*, 104 Va. 314, 321, 51 S.E. 824, 826 (1905)) (internal quotation marks omitted) (“[W]here there are two statutes, the earlier special and the latter general, the terms of the general broad enough to include the matter provided for in the special, the fact that one is special and the other general creates a presumption that the special is to be considered as remaining an exception to the general, and that the general will not be considered as repealing the special unless the provisions of the general are manifestly inconsistent with those of the special.”); 2010 Op. Va. Att’y Gen. 13, 13.

<sup>19</sup> For instance, I note that § 24.2-228(A) provides that a provision relating to vacancies in local government applies “[n]otwithstanding any charter provisions to the contrary.”

<sup>20</sup> See 2010 Op. Va. Att’y Gen. at 13, and citations therein.

<sup>21</sup> CHARTER FOR THE TOWN OF HAYMARKET, VA., art. III, § 1(4).

<sup>22</sup> *Id.* at art. III, § 1(2).

<sup>23</sup> *Id.* at art. III, § 1(7).

<sup>24</sup> *Id.* at art. III, § 1(2).

four votes, the member is not expelled. There can be no tie. Because there can be no tie, the mayor may not vote. Accordingly, I conclude that the intent of the Charter is to exclude the mayor from voting in all expulsion proceedings, whether for his office or for the office of another member of the council.

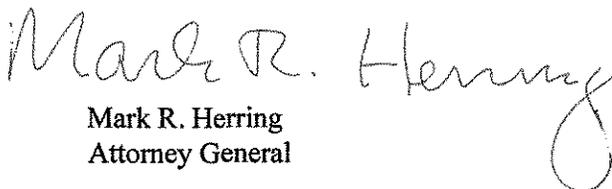
With regard to your inquiry as to whether all council members must vote in expulsion proceedings, I note that a proceeding to remove a public officer is "highly penal in nature" and statutes relating to such removal must be strictly construed.<sup>25</sup> Although Article III, § 1(5) of the Charter provides generally that business may be conducted in the presence of a quorum,<sup>26</sup> Article III, § 1(4) does not specify whether the "two-thirds" necessary to expel a member refers to two-thirds of those present and constituting a quorum, or two-thirds of all voting members of the council.<sup>27</sup> In the absence of an express provision to the contrary, a strict construction of Article III, § 1(4) of the Charter requires for expulsion the concurrence of two-thirds of all councilmen eligible to vote - that is, an affirmative vote of at least four of the six council members - not the concurrence of two-thirds of those members who are present.<sup>28</sup>

### Conclusion

It is my opinion that the provision in Article III, § 1(4) of the Charter, which allows the Town council to expel a member with the concurrence of two-thirds, is a constitutional exercise of legislative power. Sections 24.2-230 through 24.2-238, which relate to the removal of local elected officers, do not supersede Article III, § 1(4) of the Charter. Further, the mayor may not vote in expulsion proceedings, and the concurrence of two-thirds of all council members eligible to vote is required in order to remove a council member.

With kindest regards, I am

Very truly yours,

  
Mark R. Herring  
Attorney General

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<sup>25</sup> Commonwealth ex rel. Davis v. Malbon, 195 Va. 368, 377, 78 S.E.2d 683, 688-89 (1953) (internal quotation marks omitted).

<sup>26</sup> CHARTER FOR THE TOWN OF HAYMARKET, VA., art. III, § 1(5) ("A majority of the members of the council shall constitute a quorum for the transaction of business.").

<sup>27</sup> See *id.* at art. III, § 1(4).

<sup>28</sup> Under the facts you have presented, all six council positions are occupied: there is no vacancy because of death, resignation, or any other reason. Nevertheless, if there were a vacancy, the analysis would be the same: if at least two-thirds of the council members - however many members that may be - vote to expel the Mayor, he is expelled. If less than two-thirds vote to expel him, regardless of whether or not there is a tie, he is not expelled. Even if there are fewer than six council members, the Mayor does not get to vote to break a tie on a vote to expel him.