

M.J.WEED CONSULTING INC.

INTRODUCTION

The Mayor and Council of Villa Rica, Georgia engaged M.J. Weed Consulting, Inc. to review the existing City charter and comment and analyze the same. The comments and analysis provided here focus primarily on concerns as to the efficacy of some procedures, legal analysis of existing provisions especially where the same may have legal issues, and general suggestions for possible improvements to the Charter dependent directly upon the desires of the Mayor and Council. The third category of suggestions is currently the most limited. Further discussions with the Mayor and Council, Manager and City Attorney would be necessary before worthwhile suggestions could be generated based on community needs and preferences of the government. However, future conversations will undoubtedly provide other input once these preferences and needs are identified.

THE CHARTER REVIEWED AND USE OF THIS REPORT

The document reviewed is identified as City of Villa Rica City Charter, Updated by vote of the City Council, January 7, 2014 (hereinafter "Charter"). For the reader's convenience the analysis identifies specific page numbers in the Charter. Where specific sections are mentioned the abbreviation "Sec." is used. The use of the term "Para." is obviously for a specific paragraph. This report is designed to be a "first pass" review of the Charter. It has been created to be a tool in addition to and not in lieu of a review performed by the City Attorney. The author will work with the City Attorney to answer questions and make further suggested changes. The City Attorney, being far closer to the center of government and the Mayor and Council and Manager, can provide detailed insights into the history and desires of the government as further Charter work continues.

ANAYLSIS

The first phase of the analysis involved a review of the entire Charter with an eye toward provisions that might have questionable legality as either being out of date, misstatements of law or no longer viable due to preemption. This work generated forty-seven (47) items that the author decided were worthy of further research and comment. See the comments below. As the reader is likely aware, O.C.G.A. Sec. 36-35-6 provides Home Rule powers for municipalities and as such the power of local governments has been enhanced since this state law was adopted generally. Thus, today there is a more liberal view of the powers of a city than existed previously. Obviously, the portions of the report that deal with legal analysis are the opinions of the author. Such opinions are secondary to those of the City Attorney. Further, such opinions as found herein are not intended as legal advice. The main point of the section in question is highlighted in bold for the ease of the reader.

IDENTIFICATION AND LEGAL ANALYSIS OF CHARTER PROVISIONS OF CONCERN

1. Page 5. Sec. 1.13. Para.7. **Confirm condemnation powers outside jurisdiction.** Generally condemning property outside of a local government's jurisdiction is frowned upon unless the exercise of the power is both reasonable and necessary. See Mallory v. Upson County B.of Ed. , 163 Ga. App. 377, 294 S.E.2d 599 (1982) but in Kelly v. City of Griffin, 257 Ga. 407, 408(1), 359 S.E.2d 644 (1987), the court found that a city could indeed condemn extra-judicially to support its sewer lines. Tread lightly before using this authority.
2. Page 6. Sec. 1.13. Para. 13. **Local owners must maintain sidewalks.** It appears that governments can indeed force local abutting land owners to maintain the sidewalks. See O.C.G.A. Sec. 36-39-4 and Incorporated Inv., Inc. v. City of Atlanta, 176 Ga. 509, 168 S.E. 10 (1933). However, the practice is considered unpopular and the City of Atlanta Council has faced a great deal of criticism regarding the same. Many governments have this authority but few use it regularly.
3. Page 6. Sec. 1.13. Para. 15. **Prevent drunkenness, riots and public disturbances.** Public drunkenness regulation locally is fine. O.C.G.A. Sec. 16-11-41. Controlling riots cannot be legislated locally. O.C.G.A. 16-11-30. Public disturbances can also be locally legislated. O.C.G.A. Sec. 16-11-39.
4. Page 6. Sec. 1.13. Para. 16. **Regulate or prohibit the use and sale of firearms. Combustibles.** Firearms cannot be regulated locally. O.C.G.A. 16-11-173. Regulating combustibles is most likely fine. City of Doraville, which has numerous tank farms, has been regulating combustible for years by local ordinance. Be careful of regulation of interstate commerce however.
5. Page. 6. Sec. 1.13. Para. 17. **Peddlers and itinerant trades.** Yes, these businesses can be regulated locally. O.C.G.A. Sec. 48-13-9.
6. Page 7. Sec. 1.13. Para. 31. **Convicted persons can work out sentences on streets, roads, drains and squares, county work camp or jail.** Yes, this is a power granted to the local government. See O.C.G.A. 36-30-8. Particularly, violators can be assigned to work gangs for 30 days.
7. Page 7. Sec. 1.13. Para. 34. **Regulate operation of motor vehicles.** Local control of this power depends upon the subject of its exercise. Local governments are clearly in charge of roads, speeds, and traffic control devices. Article IX, Sec. II, Para. III Constitution of the State of Georgia. Thus, inherent in those powers are some powers to regulate motor vehicles. The author found no general local authority to generally regulate motor vehicles. Taxi services have traditionally been regulated by local governments.

8. Page 8. Sec. 1.15. **Failure to mention power goes to having it not having it. Dillon's Rule?** This section provides that if the Charter does not mention a power it should not be assumed that the power does not exist. The previous legal position on this concept was found in Dillon's Rule which stated generally that if a power was not specified, the government did not have the same. However, since the advent of the Home Rule powers law O.C.G.A. 36-35-6, there is a general consensus that local powers exist. See Dillon's Municipal Corps. 237 (5th Ed. 1911); Howard, Home Rule in Georgia An Analysis of Stated and Local Power, 9 Ga. L. Rev. 757 (1975) and City of Doraville v. Southern Railway Co. , 227 Ga. 504, 181 S.E. 2d 346 (1971)

9. Page 8. Sec. 2.11(a). **Elected officials must register and be qualified to vote.** State law generally regulates the majority of election qualification issues. O.C.G.A. 45-2-1, et seq. The provision of being qualified to vote is probably fine. The reader should remain concerned about a provision that forces a possible candidate to register to vote. The author could find no support for the same in state law.

10. Page 9. Sec. 2.12 (b) (2). **Elected officials face action if they willfully and knowingly violate this Charter.** This section is likely fine; however it may be a bad idea. Elected officials should be reminded that what may seem like a good idea to punish another elected official can always be used against any elected official. The author has a general concern for anything that might allow "witch hunt" committees or political factions to move against fellow elected officials. Tread carefully.

11. Page 9. 2.13. **Actual and necessary expenses.** A definition of what constitutes "necessary expenses" either needs to be inserted here or by ordinance elsewhere is probably in order so as to avoid issues later.

12. Page 9. Sec. 2.16(b). **Add aesthetics to the list.** The word "aesthetics" should be added to this list. See Berman v. Parker, 348 U.S. 26, (1954).

13. Page 210. Sec. 2.20(b). **Need details on duties and powers of Mayor pro tem.** This section is probably inadequate in the detail of what the exact duties of the Mayor pro tem are. This is best decided with further comment by the elected officials.

14. Page 10. Sec. 2.21. **Content of special meeting only on items noticed?** Many governments reduce the agenda of their special meetings only to the items specifically provided in the notice of the meeting. Whether or not to do so is a matter of political decision making. There are advantages and disadvantages to both processes. Business can be severely limited by doing this and doing so requires more pre-meeting effort and consideration; but public confidence and fellow governing official confidence might be greatly enhanced by knowing the agenda is limited to the noticed items.

15. Page 11. Sec. 2.23. **Voting. If Mayor pro tem acting as Mayor, assume no voting?** This section should be made clearer as to whether or not the Mayor pro tem can vote when she is acting as Mayor. The Mayor's veto power should also be considered here. Does the Mayor pro tem ever exercise such veto power? Should provision be made for the same?
16. Page 11. Sec. 2.24. **Includes uses of resolutions/first and second reading?** Many charters provide that in order to adopt ordinances they require a first and second reading? Again, doing so hampers efficiency but it may increase public confidence. Resolutions can be used more often. The Charter shows a preference for ordinances. Many administrative activities can be performed by resolutions. Usually, laws are reserved for use by ordinances. See page 85 Georgia Model Municipal Charter (Fifth Edition) (hereinafter "Model Code") and Atkinson v. City of Roswell, 203 Ga. App. 192, 416 S.E.2d 550 (1992).
17. Page 12. Sec. 2.26 (a) (2). **Look at formal procedure to make sure copies of all technical codes adopted properly.** Review O.C.G.A. Sec. 8-2-20, et seq. to make sure that all codes of technical regulations have been properly adopted. The reader will recall that many of the codes are considered to be adopted automatically; however some still require formal adoption by Mayor and Council.
18. Page 12. Sec. 2.27(a). **What happens if the Clerk does not promptly give an ordinance to Mayor?** This language tracks with the Model Code, page 82, but there is nothing included that indicates what occurs if the Clerk does not give the Mayor the ordinance promptly. Should a listed result occur, such as voiding the ordinance?
19. Page 13. Sec. 3.10(b). **General supervision and guidance of the Mayor and Council but direct supervision and guidance of Manager?** I think this provision is a disaster waiting to occur. Unless there are specific definitions of "general supervision and guidance", means, then the lines of authority are unclear. I would modify this provision. Either the government is a manager form of government or it is not.
20. Page. 13. Sec. 310. **Officers and directors paid as by ordinance – confirm pay ordinance exists.** This is a house-keeping item. The author recommends that the pay ordinance be located and updated as needed. The author does not encourage administrative functions like this to be Charter based as directly as is set out here. The Charter already provides the authority to have officers, directors and staff. Paying them is only logical. Thus, setting out the ability to pay for the work is better done as a resolution or other mechanism. This provision could be improved to reflect a more efficient method of recording pay which is a fluctuating administrative procedure.
21. Page. 13. Sec. 3.11(d). **Removal from office with vote for cause. Procedural due process.** Elected officials have a property interest in their positions. Most staff will not have such an interest and will be at-will. Members of boards and commissions, if they are to be removed "for cause", will require some form of due process hearing like an elected official even though they

have no property interest in the position. This needs to be covered here or preferably by an ordinance setting out a procedure.

22. Page. 14. Sec. 3.11(g). **A staff member can serve as Secretary for a board or commission.** The section seems to allow the Secretary to be staffer and be allowed to vote? Does the City really want a staff member to have a vote on a board? Doing so might also pose a conflict generally.
23. Page 14. 320. **City Manager must live in close proximity.** This is not legal, generally. The government would have to show a compelling reason for this rule. See O.C.G.A. Sec. 45-2-5, 45-2-6 and the privileges and immunities clause of U.S. Constitution, Article IV.
24. Page 14. Sec. 3.22. **City Manager can appoint officers and department directors but no definition of officers and department directors here.** These terms need to be defined here or in an administrative ordinance that refers back to this section.
25. Page 14. **City Manager public hearing and notice if terminated. Assistance of legal counsel – who pays must pay? Compensation up to 30 days from notice.** This section is fraught with future issues. The author is confident that some future Council will not desire to pay for the attorney to defend some future City Manager when the Council seeks to remove that Manager from office. Likewise, mandating the 30 days of pay could be rife with dangers for future Councils seeking to remove a Manager.
26. Page 15. Sec. 3.32. **Allows that City Attorney may be prosecutor in City Court.** This provision is generally fine; however this practice is frowned upon by the Georgia Municipal Association. See O.C.G.A. Sec. 15-18-91 for prosecutors in City Court generally. One of the concerns is the drafter of the ordinances being the prosecutor of the same might present a conflict if the drafter has to ultimately defend the drafting. The legality of the ordinance itself may get challenged and issues might arise in the defense of the City client if there is a dual role here. However, many jurisdictions do this, Sandy Springs is an example. However, see 1982 Op. Att’y Gen. No. U82-25 that says city attorneys cannot serve as prosecutors (assuming prosecutors are municipal officers). See below for more detail.
27. Page. 16 Sec. 4.10. **Council can put a councilmember on as judge?** This is a matter in some conflict. O.C.G.A. Section 36-32-1(d) seems to imply that an elected official could be appointed as the officer of the court. Yet this section could also be read as using the terms “Mayor pro tem” and “Recorder pro tem” just as other names for a judge. The City can exercise control over a court to some degree. See Ward v. City of Cairo, 276 Ga. 391, 583 S.E.2d 821 (2003) However, the Model Charter seems to indicate that no judge of the City Court can be an elected official in the jurisdiction in which they are a judge. In fact, O.C.G.A. 15-8-2 holds this directly. See also, 36-30-4 and 1982 Op. Att’y. Gen. U82-25. The author would recommend avoiding this potential issue and not employing elected officials in the Municipal Court.

28. Page. 16. Sec. 4.11. **Spacing typo.** There is a spacing issue here.
29. Sec. 4.13(a). **Penalty limit at \$5000 too high.** This penalty is not legal. See O.C.G.A. Sec. 36-32-1(c), 36-35-6, and 36-30-8. Certain statutes do allow more than the usual \$1000 fine for certain offenses but those are exceptions to the \$1000 rule.
30. Page 17. Sec. 4.14 **Appeals. What if the offense occurs in Douglas County?**
31. Page 17. Sec. 4.15. **Council approves rules in Court. Problem. Rules filed with City Clerk copy provided to each defendant and this requirement is mandatory.** This section is most likely fine. There is no separation of powers issue. The City can approve the rules and impliedly not approve them much to a judge's chagrin. See Ward v. City of Cairo, 276 Ga. 391, 583 S.E.2d 821 (2003).
32. Page 17 and 18. Sec. 5.10, et seq. **Is the election procedure listed pre-empted by state law?** Many of these sections, such as the ones setting out the districts seem fine. Bear in mind Title 21 and Title 45 of the O.C.G.A. dictate most of the field regarding elections and qualifying for office.
33. Page 18. Sec. 5.11. **Qualifying fee, write-in, absentee ballot provision pre-empted by state law.** Some of these sections are fine and some are preempted. Fees are set locally. See O.C.G.A. 21-2-131. Nomination of candidates can be done locally. See O.C.G.A. Sec. 21-2-501. However, absentee ballots, write-in voting, and challenging votes are all preempted it seems. See O.C.G.A. Sec. 21-2-522.
34. Page 18. **Just check sec. 5.21 on appointing if vacant 90 days out form term amend.** This is probably fine. See Art. V, Sec. II, Para. VII(a) of the Constitution of the State of Georgia and also O.C.G.A. Sec. 21-2-540.
35. Page 19. Sec. 5.31. **Procedure for removal of officer.** Probably legal but do you really want to do this? Removing elected officials is dealt with in O.C.G.A. Sec. 45-11-4. See also 45-2-1, 45-5-1, 45-5-6.1 and 45-11-4. Some of these sections provide particular procedures depending on what charges are made. Power to remove officials does not appear to be preempted. However, procedural due process rights must be guaranteed in the Charter and any administrative ordinance that stems from it (such ordinance should be tied to the Charter provision directly). See Stapleton v. City of Ludowici, 258 Ga. 868, 375 S.E. 2d 855 (1989) for a list of do's and don'ts on a proper due process section in a charter. Also, the Mayor and Council should be reminded that a procedure can be used against any of them.
36. Page 19. Sec. 6.10 **Property tax mills set 13 in charter. Accurate.** Is this still the accurate mill rate? Also, it seems like a bad idea to put something which could/should be a fluctuating number in the Charter which should be a more semi-permanent document.

37. Page. 19. Sec. 6.11. **City exempted from 92-4101.** After considerable electronic and physical research the author cannot locate this section. It is assumed that it refers to the Georgia Code 1933. However, a detailed electronic and physical code conversion search has not turned up the converted O.C.G.A. sections referred to here. One assumes they are in Title 48 which is the tax code generally. Thus, the author recommends a change in this section unless and until the references to the code are cleared up.
38. Page 20. Sec. 6.12. **Authorize voluntary payment when and how. Possible anti-gratuity issues?** O.C.G.A. Sec. 48-5-23 does allow installments payments of tangible property taxes. Thus, this section is probably fine. Nevertheless, be cautious of a violation of the anti-gratuity clause of the Georgia Constitution in accepting installments on taxes.
39. Page. 20. Sec. 6.13. **Typo** “imposes” in next to last line.
40. Page 20. Sec. 6.14. **Check on occupation tax standard, transact or offers to transact. Not sure correct.** This section is probably fine. See O.C.G.A. Sec. 48-13-7 regarding taxation of out of town business and 48-13-6 relevant to taxes based on home situs.
41. Page 22. Sec. 6.34. **Mandatory next order of business after budget approval is levy of tax.** Is this necessary? What happens if the item is not the exact next order of business?
42. Page 23. Sec. 6.41. **Sell public property without advertisement.** This section must be changed. See O.C.G.A. Sec. 36-30-2, 36-34-3, and 36-37-1 to 6.
43. Page 24. Sec. 7.13. **City can lay pipe without charge from the county.** Within the city limits this provision may be fine. See O.C.G.A. Sec. 36-36-7(b). However, outside of the city limits this provision is probably not legal. See O.C.G.A. 36-34-5 and Coweta County v. City of Newnan, 253 Ga. 457, 320 S.E.2d 747 (1984).
44. Page 24. Sec. 7.20. **City can regulate, license, make pay taxes business being done in city regardless of home office being there.** This is fine. See O.C.G.A. Sec. 48-13-7.
45. Page 24. Sec. 7.21. **Check on list of subjects for franchises and any now pre-empted.** See O.C.G.A. 36-34-2(7)(A) for a list of business/utilities a city can require franchises from.
46. Page. 25. Sec. 9.10 **Zoning Board that does zoning not Council.** Unless there is a Constitutional Amendment specific to Villa Rica it is unlikely that Villa Rica can perform all of its zoning through a zoning board. This is a non-delegable power since 1983. Only the “local government” which means the city elected officials can make a “zoning decision”. Maps, regulations and rules are clearly zoning decisions. See Article IX, Sec. II, Para. IV, Constitution of the State of Georgia and O.C.G.A. Sec. 36-66-2. The author has checked the Constitutional Amendments applicable to

Villa Rica and there does not seem to be a separate zoning board provided. See Exhibit A. City of Macon/Bibb County is one of the few cities that have such an amendment.

47. Page 26. **Penalties. \$5000.** Too high. See Number 29 above.

CONCLUSION

All in all the Charter is in good shape. There are some items that are clearly not legal and others that deserve some wholesale changes based on Mayor and Council preferences. As always, our company invites comments and questions regarding this report and we look forward to the same.

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