

ORDINANCE TO ASSURE CONTINUITY OF GOVERNMENT DURING THE COVID-19 PANDEMIC DISASTER BY ENACTING AND AUTHORIZING SUPPLEMENTAL TEMPORARY CHANGES IN CERTAIN DEADLINES, MODIFIED SUPPLEMENTAL AND REMEDIAL PUBLIC MEETING AND PUBLIC HEARING PRACTICES AND PROCEDURES, AND OTHER EMERGENCY ACTIONS NECESSARY TO ASSURE SAFE AND EFFICIENT AND EFFECTIVE GOVERNMENT OPERATIONS

WHEREAS, on March 13, 2020, the former President of the United States declared a national emergency, beginning March 1, 2020, in response to the spread of COVID-19, and also declared the novel Coronavirus (“COVID-19”) emergency which the Federal Emergency Management Agency (“FEMA”) designated as “Disaster #3448” in Virginia (“EM-3448-VA”), with an “incident period” that began on January 20, 2020 and continued until April 10, 2023, when the current President of the United States signed into law House Joint Resolution 7 (“H.J.R.7”), terminating the national emergency and disaster over COVID-19; and

WHEREAS, on March 11, 2020, the World Health Organization declared the COVID-19 outbreak a pandemic, and according to the International Federation of Red Cross and Red Crescent Societies, pandemics are classified as a natural hazard; and

WHEREAS, on March 12, 2020, former Governor Ralph S. Northam issued his Executive Order Fifty-One (“E.O.-51”) declaring a state of emergency for the Commonwealth of Virginia arising from the COVID-19 pandemic; and

WHEREAS, the former Governor’s E.O.-51 acknowledged the existence of a public health emergency which constitutes a disaster, as defined by Virginia Code § 44-146.16, arising from the public health threat presented by a communicable disease anticipated to spread, and this public health emergency continued to be a state-recognized emergency and a disaster through July 1, 2021, by the former Governor’s E.O.-79 and Order of Public Health Emergency Ten Ending of Commonsense Public Health Restrictions Due to COVID-19 on May 14, 2021; and

WHEREAS, the Governor’s Executive Orders ordered implementation of the Commonwealth of Virginia Emergency Operations Plan, activation of the Virginia Emergency Operations Center to provide assistance to local governments, and authorization for executive branch agencies to waive “any state requirement or regulation” as appropriate; and

WHEREAS, by Public Safety Order dated March 12, 2020, the City of Charlottesville City Manager (“City Manager”)/ Director of Emergency Management declared a state of local emergency, based on a threat to the public health and safety of the residents of the City of Charlottesville (the “City”) resulting from the communicable and infectious COVID-19 virus, which threat was and continued to be an emergency as defined in Virginia Code § 44-146.16 for a lengthy time as evidenced by the Center for Disease Control’s weekly positivity rate for the City of Charlottesville; and

WHEREAS, the Virginia Supreme Court unanimously issued a series of emergency orders, beginning with its March 16, 2020, Order Declaring a Judicial Emergency in Response to the

COVID-19 Emergency in reliance on and in response to the former Governor's E.O.-51, and ending with its May 27, 2022, Fortieth Order Extending the Judicial Emergency in Response to the COVID-19 Emergency, which expired on June 22, 2022. Said emergency orders recognized "the ongoing impact and effects of the COVID-19 pandemic [which] continue[d] to impede the operation of Virginia's courts, and to limit the courts' ability to ensure (i) immediate access for litigants and others, and (ii) that schedules or time deadlines imposed by court order, rule, or statute are met," the "public health threat," and "the current COVID-19 emergency," which affected the courts system across Virginia ultimately for a time period from March 16, 2020, through June 22, 2022; and

WHEREAS, the City of Charlottesville City Council ("City Council") found and finds that the COVID-19 virus constituted a real, substantial and continuing threat to public health and safety and constituted a "disaster" in the City as defined by Virginia Code §44-146.16 and as established in Virginia Code § 15.2-1413, said virus being a "communicable disease of public health threat" from at least as far back as March 13, 2020, and lasting through April 10, 2023, when the national pandemic emergency and disaster was terminated; and

WHEREAS, Virginia Code § 15.2-1413 is a statutory provision dating back to the 1920s, which in light of the then-recent Spanish Flu pandemic and World War I, has since provided through various recodifications that, notwithstanding any contrary provision of law, a locality may, by ordinance, provide a method to assure continuity of government in the event of a disaster such as the COVID-19 pandemic emergency for a period not to exceed twelve months from the date of such disaster, and this method may be in lieu of normal procedures provided by general law; and

WHEREAS, City Council adopted 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, but thereafter City Council and the City Manager continued certain pandemic-indicated measures for some City public bodies including virtual meetings consistent with this Ordinance, the above-named continuity of government ordinances, the Virginia Freedom of Information Act ("FOIA"), including Virginia Code §§ 2.2-3708.2 and 2.2-3708.3, and/or other law; and

WHEREAS, 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)), and this 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, that 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; and

WHEREAS, City Council, during the time period from March 25, 2020, through September 6, 2022, and many other City public bodies (as defined herein), from March 25, 2020, through April 10, 2023, met virtually due to the danger to the public, applicants, community, staff and City Council from the pandemic disaster pursuant to various authorizations and actions from

national, state and local leaders, and continued local government functions and operations despite that danger and disaster; and

WHEREAS, during that time period, the public was given additional access to public meetings virtually through the internet and other means, which expanded and increased public participation opportunities and the access to public meetings and opportunities afford citizens virtual choices for input in the City, and additionally, from September 8, 2022, onward, in-person access was given to City Council meetings under certain safeguards and conditions, and during those time frames, City Council and other City public bodies conducted the continuing work of local government and acted to serve the good of the community, notwithstanding the ongoing emergency pandemic and the public health concerns; and

WHEREAS, on March 23, 2023, the Virginia Supreme Court issued in its opinion in the case of *Berry v. Board of Supervisors of Fairfax County* (the “Berry Opinion”), which 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, and 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, which was unexpected and a sudden shift in what was otherwise well-understood and well-settled law; and

WHEREAS, the Berry Opinion is not yet final, as it is currently under reconsideration by the Virginia Supreme Court, and in the opinion of the City Attorney, 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; and

WHEREAS, the Berry Opinion has caused uncertainty regarding the validity of certain actions of City Council and other City public bodies, for the City’s citizens, businesses, property owners, and visitors who rely upon the certainty and finality of the actions of City Council and the other City public bodies for decisions, investments, purchases, and other actions and behavior; and

WHEREAS, City Council has the power to adopt retroactive legislation such as this Ordinance as a legislative power, which 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); and

WHEREAS, in response to the uncertainty created by the Berry Opinion, and to reassure the community, City Council wishes to retroactively adopt a remedial continuity of government ordinance to assure public health, and ensure certainty and continuity of government to supplement as needed, but not necessarily replace, the authority referenced above to allow City Council and all other public bodies of the City to have met solely virtually by electronic means from March 25, 2020, through the termination of the national emergency and disaster as declared in Virginia on April 10, 2023; and

WHEREAS, 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, recognizing that the pandemic disaster went through various stages and took multiple turns, while at the same time the City Council and public bodies were expected to and did bravely and in good faith continue local government for the good of the community, while attempting to maintain health and safety; and

WHEREAS, this Ordinance is intended to be retroactive and remedial, and is enacted 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.

NOW, THEREFORE, BE IT ORDAINED by the Council of the City of Charlottesville, Virginia, that City Council finds and ordains the following to retroactively apply in the City of Charlottesville for the emergency and disaster period from March 25, 2020, through April 10, 2023, as if these provisions were in effect for that time period:

1. **THAT** the continuing COVID-19 pandemic and disaster from March 25, 2020, through April 10, 2023, made it unsafe for public bodies to conduct their meetings in accordance with normal practices and procedures, because such practices and procedures required the physical presence of members of a public body and members of the public within the same room and facilities. That such congregate gathering did not allow adequate measures to be taken in accordance with public health requirements and guidelines of the CDC and Virginia Department of Health. For

the purposes of this Ordinance the term “Public Body” means the City Council, and each board, commission, or agency of the City of Charlottesville, including any committee, subcommittee, or other entity, however designated, created by City Council to perform delegated functions of City Council or to advise the City Council, or entities which exist to carry out statutorily-directed duties and powers as a local public body whether appointed by City Council or the Circuit Court for the City of Charlottesville (collectively “Public Bodies”); and

2. **THAT** in accordance with Virginia Code § 15.2-1413, and notwithstanding any other provision of law, general or special, the following emergency procedures are adopted to ensure the continuity of the City government during the COVID-19 emergency and disaster from March 25, 2020, through April 10, 2023, and Public Bodies may utilize these procedures in lieu of, or in addition to other procedures otherwise applicable:

a. Any meeting or activities which normally would require the physical presence of a quorum of members of a Public Body may be held only through real time electronic means (including audio, telephonic, video or other practical electronic medium) without a quorum physically present in one location, and

b. The City Manager is hereby authorized to restrict the number of electronic meetings each Public Body may conduct each calendar month, based on the capacity and availability of the City staff who are capable and qualified to support the meeting to ensure compliance with this Ordinance, and

c. Prior to holding any such electronic meeting, the Public Body shall provide public notice of at least three (3) days in advance of the electronic meeting identifying how the public may participate or otherwise offer comment, and

d. Any such electronic meeting of a Public Body shall state on its agenda the location at which members of the public can obtain information as to the means by which the public may access and participate in such electronic meeting, and

e. Any such electronic meeting of a Public Body shall be open to electronic participation by the public and closed to in-person participation by the public, and each electronic meeting shall be conducted in a manner designed to maximize public participation, and

f. A video recording of all electronic meetings shall be made available on the City’s website within three (3) business days following each electronic meeting, and

g. With respect to any matter which requires a public hearing, the public hearing may be conducted by an open public comment period called for during an electronic meeting, as well as by submission of written comments to the Clerk of City Council prior to, during, and for five (5) business days after the electronic meeting. Notice of the public hearing shall be posted on the City’s website at least five (5) business days prior to the date of the public hearing.

h. The minutes of all electronic meetings shall conform to the requirements of law, shall identify how the meeting was conducted, the identity of the members participating, and shall specify what actions were taken at the meeting. A Public Body may approve minutes of an electronic meeting at a subsequent electronic meeting, and

i. Any provision of Virginia Code §2.2-3708.2 requiring the Public Body's approval of electronic participation due to a member's personal matter or medical condition shall not apply for the duration of the time period that this Ordinance is applicable.

IT IS FURTHER ORDAINED THAT, notwithstanding any provision of law, regulation or policy to the contrary, any deadlines requiring action by a Public Body or any City officers (including Constitutional Officers) or City employees, within a period of sixty (60) or fewer days, shall be suspended during this emergency and disaster. The Public Bodies, and the City's officers and employees, are encouraged to take all such action as is practical and appropriate to meet those deadlines; however, failure to meet any such deadlines shall not constitute or be deemed to be a default, violation, approval, official recommendation or other action.

IT IS FURTHER ORDAINED THAT any scheduled non-emergency public hearings and action items of a Public Body may be postponed to a date certain if, in the judgment of the Public Body, it would be in the best interests of the public to do so, provided that public notice is given so that the public are aware of how and when to present their views.

IT IS FURTHER ORDAINED THAT this Ordinance shall not operate to preclude any Public Body from making its own decisions and rules regarding the conduct of its meetings either electronically or by means of having a quorum physically assembled, so long as those meetings are in compliance with applicable Executive Orders of the former Governor of Virginia, any local ordinance which may be enacted by this City Council (including this one) in response to the COVID-19 virus emergency within the City locally or statewide, and/or other state and local laws and policies; however, any such Public Body may also elect to conduct its meetings virtually solely electronically within the purview of this Ordinance and/or any other applicable laws and policies.

IT IS FURTHER ORDAINED THAT a continuing emergency existed, and the City Manager's declaration of a local emergency, authorized by resolution of this City Council on March 12, 2020 (#R-20-035) remained in effect through the September 8, 2022, Virginia emergency declaration, which declaration was in effect through July 1, 2021, and the nationally-declared emergency and disaster in Virginia remained in effect from March 12, 2020, through April 10, 2023; and the various actions referred to within this Ordinance are necessary to be taken to address the continuing emergency referenced in one of more of these declarations; and

IT IS FURTHER ORDAINED THAT to the extent permitted by law, City Council hereby ratifies and authorizes all ordinances, resolutions, motions and actions taken by City Council or any Public Body within the City during the timeframe referenced above of emergency and pandemic disaster; and

IT IS FURTHER ORDAINED THAT pursuant to Charlottesville City Code § 2-96, by a four-fifths vote of City Council, this Ordinance is enacted on the date of its introduction, shall be immediately and retroactively effective upon its adoption, shall be applied retroactively as in full force and effect for the time period from March 25, 2020, through April 10, 2023, and supplements (but does not supersede) any other ordinance, statute or law authorizing actions of City Council or any other Public Body in the City.