

PILOT HOME RULE PROGRAM

APPLICATION PLAN

OF THE CITY OF WHEELING

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INTRODUCTION

Pursuant to W. Va. Code, the Legislature has found that the future economic progress for the State of West Virginia is directly related to the success of its municipalities in that stronger municipalities will make for a stronger West Virginia; the City of Wheeling respectfully submits its application for consideration by the Municipal Home Rule Board. The City of Wheeling faces numerous challenges managing its budgets and delivering services required by federal or state law or demanded to its constituents. The municipality is sometimes restricted by state statutes, policies, rules and responsibilities that prevent it from carrying out its duties and responsibilities in a cost-effective, efficient and timely manner. The City of Wheeling is quite capable of exercising broad-based home rule as the City of Wheeling is a full service Class II municipality with approximately 450 full-time employees and administration who can carry out the proposals formed in this application. The City of Wheeling is committed to utilizing its internal and necessary external resources to provide successful application of the powers that the pilot program might permit. The City of Wheeling recognizes that this is an opportunity for the legislature to evaluate the viability of allowing municipalities to have broad-based state home rule to improve urban and state development and Wheeling wishes to be a part of this exciting opportunity. It is the intent of the City of Wheeling to work within the legislative framework of W. Va. Code § 8-1-5a for municipalities within which new ideas can be explored to see if they can or should be implemented on a statewide basis.

It is not the intention of the City of Wheeling to utilize Home Rule Authority to fill the coffers of the general fund. On the contrary, the City of Wheeling is not proposing any changes in taxation or revenue increases at this juncture. The City of Wheeling as a City Manager-Mayor-City Council form of government is well poised to be chosen to become one of the municipalities included in the pilot home rule program. The City maintains a balanced yearly budget, and maintains a Budget Stabilization Fund of \$1,000,000. Under the direction of the City Manager, the City has also been fortunate to have several years of cash carry overs within the budget. The City is also familiar with executing legislative initiatives to successful conclusions as Wheeling was the first city in the state of West Virginia to set up a Tax Increment Financing District and issue bonds pursuant to recent legislation.

The City of Wheeling has a very sound budgeting philosophy, based on conservative revenue projections versus reasonable expectations for expenditures. Generally speaking, the municipal services that have been provided to the citizens of Wheeling historically remain the same although some of the proposals made herein would increase services and any fees associated with such services would not generate revenue outside of supporting the proposed services. The City continues to work hard to insure that the most efficient and effective services possible are being offered to the community and continually strives to improve our service delivery and the exercise of Home Rule Authority would, if given the opportunity, be utilized in the most judicious manner and in a manner to best serve this City and the State of West Virginia. Any supplemental budgetary information that the Home Rule Board wishes to review is available upon your request.

The City's budget and employee base will be capable of carrying out the proposals pursuant to Home Rule implementation. Supplemental information concerning the City's workforce and general information is also included for review and additional information is available upon request. The City of Wheeling City Solicitor has years of experience working with the West Virginia

Municipal Attorneys Association, the International Municipal Attorneys Association and the West Virginia Municipal League and will devote the necessary time, effort and resources of the Legal Department toward the success of this pilot program. The City of Wheeling believes that if given Home Rule Authority, there are many areas that could be reviewed and discussed with the possibility of further developing or amending the plan as proposed at this application submittal phase. If chosen as a pilot municipality, the City of Wheeling feels confident that it can administer the authority given to it by the legislature as envisioned by the legislators of the State of West Virginia.

W. VA. CODE § 8-13-13 – SPECIAL CHARGES FOR MUNICIPAL SERVICES

The City of Wheeling, along with other cities, has expressed a desire for statutory revisions to enhance enforcement of liens which result from the municipality providing services for which they are not paid. A portion of the Governor's Taxation Report utilized during the 2007 Legislative Session also focused upon a collection of unpaid municipal fees. However, W. Va. Code § 8-13-13 prevents the municipality from effectively carrying out its duties, enforcing its actions and collecting upon fees expended. The ability to utilize Home Rule Authority concerning service liens would provide relief to cities such as Wheeling that currently can institute fees for various services which would include vacant properties and place liens upon the property for purposes of collection of unpaid fees.

Currently when cities such as Wheeling spends over Two hundred Thousand Dollars (\$200,000.00) per year to demolish dilapidated property, the vacant property escheates to the state and later is sold for amounts as low as one dollar (\$1.00) and the City loses its lien and collects \$0.00 after having gone onto the property and abating a health, safety, welfare nuisance in the city. The City of Wheeling, as other municipalities, historically possesses the authority to craft individual ordinances and programs tailored to inspection, administration and fee assessment yet the lack of a statutory enforcement and collection mechanism has been an obstacle for municipalities.

The City of Wheeling wishes to have the ability, after due notice is given to the property owner of the intended action, to collect upon the lien due the municipality in a collection action or via a property sale conducted either in a similar fashion as that of Wilmington, Delaware (see attached Exhibit A), or in the same fashion as any municipal land sale. This is primarily a concern that has arisen because of the increase in abandoned or dilapidated property throughout our City and State. W. Va. Code § 8-13-13 does not specifically incorporate all services that the City provides, such as the demolition costs of abandoned structures as well as the program costs associated with the property registration inspection, administrative hearings, etc. Therefore, the City of Wheeling would like to incorporate such services as abatement of uninhabitable, abandoned structures into the existing enabling statute of W. Va. Code § 8-13-13 by utilizing the powers of Home Rule Authority. This will also assist the City when it abates such nuisances by demolition or otherwise.

The City believes that providing the ability to expand the municipal authority found in the powers of W. Va. Code § 8-13-13 will benefit the self governance of Wheeling, which can, in turn, devise its own particular ordinances tailored to the particular needs of the municipality regarding services provided and collection for such services. For instance, Wheeling can adopt an ordinance with a detailed procedure, similar to that in the attached exhibit from Wilmington, Delaware, tailored to provide a registration or inspection program and to rid the municipal landscape of abandoned and

dilapidated structures **but** there must first be some allowance in state law, Home Rule Authority in this instance, to provide the municipality with some legal authority to do the ultimate act which usually is monetary fines and the ability to enforce the collection of fines for those in non-compliance with the municipal code.

Pursuant to W. Va. Code § 8-13-13, certain municipal fees are **not** permitted to become liens against the property, this language is currently part of the statute and truly needs to be changed. It is extremely counterproductive and actually makes no sense when one reads the statute. For example, if a municipality has a duty to provide a service, a right to collect fees and fines why not have an absolute ability to lien the property if not paid? The City of Wheeling would seek to utilize Home Rule Authority to permit the liens rather than prohibit the liens.

The City is advocating the ultimate enforcement mechanism of the ability to collect upon the unpaid fee liens by a forced property sale (as in Wilmington, Delaware) as outlined in the attached exhibit from Delaware, or in the alternative creating a first priority lien status for all municipal fees. However, the City recognizes that Wheeling may need to share a first lien priority position if the Home Rule Board believes this is more fair or equitable. If given the ability, the City of Wheeling would like the opportunity to further investigate the issue of lien placement, collection and enforcement of unpaid liens. The City has the staffing and legal counsel to review the various areas of practical, legal and equitable concerns.

Following this summary is a draft amendment of W. Va. Code § 8-13-13, which demonstrates the areas of the statute the City finds problematic and would change through Home Rule, and to demonstrate a municipal lien priority. The City could incorporate the draft changes to the statute in an ordinance so that such liens placed for fee collection have a first priority when any subject property is sold, even in county and state tax sales. Also, in trying to accommodate possible concerns of those entities which the City of Wheeling identifies as potential stakeholders, it is suggested that the City's ordinance language could recognize that, should a banking institution already have a first-in-time priority status, any municipal fee would share such status and in no case would a municipality collect less than 50% of said fee or lien in the case of a forced sale including a county or state tax sale. The City of Wheeling would work in tandem with other lien holders just as it currently does in any forced sale, however there would be more ability to secure the repayment of the fees for services expended and the City could initiate the enforcement action for fee collection in the form of a land sale.

W. Va. Code § 8-12-16 regarding its application ordinances, specifically for regulating uninhabited dwelling and buildings, would also need to be a section of the code that the City of Wheeling would need to have modified since that section limits the demolition liens in an amount not to exceed assessed value of the property. It is the City's position that the lien should represent all costs, interest and fee penalty and accumulation thereof. W. Va. Code § 8-12-16 is mentioned at this time as it is a parallel statute that a municipality can use in conjunction with W. Va. Code § 8-13-13. W. Va. Code § 8-12-16 is discussed in the next section as a proposal specific to abandoned and/or vacant structures.

DRAFT OF AREAS IN W. VA. CODE § 8-13-13 THE CITY OF WHEELING WOULD PROPOSE TO MODIFY PURSUANT TO HOME RULE AUTHORITY

§ 8-13-13 (Municipal Fees) – Special charges for municipal services would need to be more flexible and provide the City with more enforcement tools, the areas of the statute that are problematic have been modified and what the City may propose as an alternative in the form of an Ordinance pursuant to Home Rule Authority is provided below as a modification of the current language in the statute. [The City’s proposed changes are in italics, which could be incorporated into an ordinance.]

Notwithstanding any charter provision to the contrary, every 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, *abatement of uninhabitable, abandoned structures, sewerage and sewage disposal ... [interim text from §8-13-13 omitted as it is unchanged and remains as currently written in the statute.]* The municipality ~~not however~~ shall have a lien on any property as security for payments due under this section and pursuant to such ordinance. *Liens placed for fee collection have a first priority when any subject property is sold, even in state tax commission sales. Also, should a banking institution already have a first-in-time priority status, any municipal fee would share such status and in no case shall such municipality collect less than 50% of said fee or lien. After six (6) months has passed from the date a municipal lien is recorded, any liens that remain unsatisfied by payment in full to the municipality shall be subject to sale by the municipality to satisfy the lien. The sale shall be conducted in the same manner as all municipal property in accord with W. Va. Code § 8-12-18 after legal notice has been given to the property owner, or in accord with an ordinance duly adopted by the municipality providing for a service program and the mechanism for enforcement and collection being detailed therein. Any filing fees that a municipality must pay to seek enforcement shall be waived to effect such filing yet shall be collected as part of the debt owed by the property owner and payable directly to the court wherein the action is filed so long as the claim only involves the collection of fees and interest due to such municipality excluding attorney fees.*

Key Points as to Why W. Va. Code § 8-13-13 does not provide the City of Wheeling an ability to effectively collect and enforce its service liens:

- I. The purpose of this proposal is to provide an enforcement mechanism for the City of Wheeling to collect delinquent municipal fees by providing that all service liens shall be placed on property, liens for delinquent fees will have a first priority should the property be sold at a forced sale and that the City may have the option of initiating a sale.
 - The City of Wheeling needs to have some sort of an enforcement mechanism behind the service programs that are instituted for the public good.
 - Currently many of the fees assessed for unpaid service bills, demolition costs, or for health/safety non-compliance issues which result in fees being assessed are lost funds due to the City’s inability to collect even a portion of such fees if property owners fail to pay and later sell the property or the property is sold to the state for delinquent taxes.

- The City of Wheeling needs a lien priority status to assist in fee collection at the final stages of any of its programs such as building codes (demolition costs/uninhabitable/abandoned structures), health codes (abating of public health nuisances), fire service fees, etc. The City of Wheeling needs to be able to, through assertion of Home Rule powers, fully utilize and expand W. Va. Code § 8-13-13 to assist in a legal, equitable form of recapturing some of the general fund or grant monies expended to enhance public health, safety and welfare and so that there will be some incentive for property owners to comply.
- The City of Wheeling already utilizes initial waiver of filing fees in Fire Service collection cases but would need to have the collection filing fees waived up front in filing actions in the court systems and collected from the property owners upon judgment. As this fee waiver is used for some utility service collection actions, and some magistrate courts have permitted such filing by municipalities to be paid by those in violation after judgment is made or prior to any agreed dismissal, the City believes that an ordinance stating such procedure for filing fees would be a beneficial exercise of Home Rule Authority. The state court system still receives its fees, but it makes it easier on the general funds of the cities if the initial filing fees are not required to be paid by the City at the time of filling and the fees become part of the lien if a judgment is received yet not paid. Such filing fees are waived only when the city wants to collect the fees owed and the legal interest on such fees, however a city cannot recover legal expenses.
- The proposal focuses upon expanding the current enabling statutes to enhance municipal enforcement measures and to allow cities to incorporate particular service needs and procedures for carrying out the services as well as enforcement provisions into local ordinances as the cities themselves believe is necessary. This provides more local control along with a statutory enforcement tool.

Vacant Property Registration Program

- II. Vacant properties deter development and re-development initiatives, attract loitering and vagrancy, can be havens for drug use or are pit stops for prostitution and pose numerous health safety threats spanning from the potential of fires, dilapidation, weeds and debris. Even if a property is not so dilapidated as to pose an immediate concern under state and city building code standards, empty vacant structures are detrimental to our City's neighborhoods and commercial areas. In addressing the degenerative blight caused by abandoned properties, the City of Wheeling would propose a property registration program pursuant to a codified ordinance and under an enlargement of the general authority of the following statutory provisions:

W. Va. Code § 8-12-5 General powers of every municipality and the governing body thereof.

In addition to the powers and authority granted by: (1) The constitution of this state; (ii) other provisions of this chapter; (iii) other general law; and (iv) any charter, and to the extent

not inconsistent or in conflict with any of the foregoing except special legislative charters, every municipality and the governing body thereof shall have plenary power and authority therein by ordinance or resolution, as the case may require, and by appropriate action based thereon:

... (23) To provide for the elimination of hazards to public health and safety and to abate or cause to be abated anything which in the opinion of a majority of the governing body is a public nuisance; ...

This section for state law is generally referred to as the municipal plenary power section. The City of Wheeling would propose to initially utilize this statute as a base for instituting a vacant property registration program, including provisions for enforcement, fees and liens which can be exercised through forced sales. The City of Wheeling may model its use of personnel, program administration and ordinance creation on that of the City of Wilmington, Delaware as attached as an exhibit herein. The City of Wheeling would like an opportunity to further pursue the necessary discussions between the governing body, staff and the public concerning this vacant property registration program and potential avenues of enforcement.

W. Va. Code § 8-12-16. Ordinances regulating the repair, closing, demolition, etc., of dwellings or buildings unfit for human habitation; procedures.

(a) Plenary power and authority are hereby conferred upon every municipality to adopt ordinances regulating the repair, alteration or improvement, or in vacating and closing or removal or demolition, or any combination thereof, of any dwellings or other buildings unfit for human habitation due to dilapidation, defects increasing the hazard of fire, accidents or other calamities; lack of ventilation, light or sanitary facilities or any other conditions prevailing in any dwelling or building, whether used for human habitation or not, which would cause such dwellings or other buildings to be unsafe, unsanitary, dangerous or detrimental to the public safety or welfare ...

This section of state law also provides the City of Wheeling *some* ability to carry out its duties to preserve the health, safety and welfare of the community when faced with uninhabitable properties and non-compliant or deceased, etc., property owners. The statute is helpful in providing some relief and procedure for municipal action, enforcement and collection, but it does not go far enough (i.e., § 8-12-16(d) only allows a lien to be placed and limits the lien amount to the assessed value of the property).

In 1999 the City of Wheeling adopted Article 1722 – Uninhabitable Structures, pursuant to both W. Va. Code § 8-12-5(23) and § 8-12-6. (A copy of the City’s current codified ordinance is attached.) The City of Wheeling is proposing to amend the current section of its codified ordinances at Article 1722 to include a section for vacant structures (similar to the laws in the City of Wilmington, Delaware as attached).

The vacant building registration requirements and penalties could be added to the current city code as an amendment. In the alternative, a new article could be created separate from

Uninhabitable Structures, however it would be justified to amend the current Article and include Vacant Property within the title, headings and text. Again, please review the attached documentation from Delaware marked as an exhibit as this would be a template that the City of Wheeling would utilize. Pursuant to Home Rule Authority, the City of Wheeling could propose that the law adopted by the Delaware legislature, or another ordinance with similar objectives, be codified as a municipal ordinance. The proposed ordinance would be reviewed and modified by the Rules Committee of Council and by Council as a Whole (Body). Open meetings and discussions of the proposed ordinance amendments would have all of the formality required of such ordinance adoption, including a public hearing. This proposal is a request to enlarge and expand existing powers concerning extinguishing the proliferation of vacant structures.

Municipal Planning and Zoning

- III. Prior to the 2003-2004 Legislative Session Municipal Planning and Zoning laws found in W. Va. Code § 8-24 et seq. had been in existence since 1969. In 2004 the code was amended, as W. Va. Code § 8A-24 et seq., primarily with the input of *some* city/county planners and land developers. No municipal attorneys from the West Virginia Municipal Attorney's Association had been consulted. This is noted only to demonstrate that sometimes things that aren't broken do not need be modified in totality and from an attorney's position the well established statutes, legal interpretation and case law dealing with the law did not need adjusting through legislation. Although most of the newer versions (W. Va. Code § 8A-24 et seq.) of the Municipal Corporations Planning and Zoning Code actually parallel the prior version (W. Va. Code § 8-24 et seq.), there are several areas that are problematic, and the City of Wheeling would like an opportunity to address these through the application of Home Rule principles.

Initially the City of Wheeling recognizes that as it has a well developed Planning and Zoning Codified Ordinance, Comprehensive Land Use Plan, Administrative staff personnel and established Boards and Commissions. Throughout the newer version, for lack of better terminology, of the Planning Code, the legislature recognized that cities such as Wheeling could continue to utilize their land use ordinance, comprehensive plan, etc., and rely upon the pre-2004 state law as authority until such time as the municipality wants to amend the land use plans or zoning codes. (See for example W. Va. Code § 8A-4-7 and § 9A-7-12; which offer examples of "grandfathering" provisions found throughout the newer code).

The 2004 version of the Code reads, for example, at Section 8A-7-12 as follows:

§ 8A-7-12. Validation of prior zoning ordinance.

All zoning ordinances, all amendments, supplements and changes to the ordinance, legally adopted under prior acts, and all action taken under the authority of the ordinance, are hereby validated and the ordinance shall continue in effect until amended or repealed by action for the governing body taken under authority of this article.

Should the City of Wheeling wish to amend and modify its land use ordinance, as any municipality concerned about development and land use would, it must comply with the 2004 version of the state code. As previously stated, most of the newer version is almost exactly like the older version. However, there are several areas that the City of Wheeling would like to either revert to being able to continue to utilize the language in the former Land Use Code and to further modify some provisions of the land use code. In particular, the City of Wheeling would like to utilize Home Rule Authority to return to the governing body the authority it previously possessed concerning the governing body's ability to amend and modify its land use plans. The areas, in brief, that the City would propose as potential areas of change pursuant to Home Rule Authority, are as follows:

A. Governing Body's Authority to Amend, Supplement and Change Land Use Ordinance.

The City of Wheeling wishes to maintain its historic ability, and what it believes is its statutory duty and right to promote the orderly development of its governmental units and environs by reestablishing and continuing to utilize the following section of statute from the older version of the code:

[Part XI – Same – Amending, Supplementing or Changing Zoning Ordinance Rules and Regulations]

W. Va. Code § 8-24-45. Supplemental and amending ordinances

The governing body of a municipality or the county court may, from time to time, amend, supplement or change the rules and regulations and districts fixed by ordinance hereunder.

Acts 1959, c. 118; Acts 1969, c. 86.

W. Va. Const., art. IX, § 9, predesignated the office of the county court as county commission.

The Governing Body of Wheeling, West Virginia wishes to reclaim the constitutional dictate and the Legislature's historic recognition that the municipality's elected officials have plenary power to establish land use laws and provide for their regulation. See generally W. Va. Code § 8-12-5 and W. Va. Code § 8-24 et seq. (legislation prior to 2004) as well as § 8A-24 et seq. (2004 legislation).

B. Institution of Conditional Land Use/Special Land Use Permits

The City of Wheeling, like most West Virginia cities, are older in character. Many areas of the City present either a single building, property or group of properties that do not quite fit within the zone which surrounds them. For example, a building used for decades as a commercial grocery store which lies surrounded by residence in a

residential zone. In order to be best utilized or utilized in any way the parcel would have to be re-zoned – which is legally questionable under a ‘spot zoning’ application, but more so is problematic because of the blanket grant given to the property if it is simply re-zoned rather than custom fit with a conditional land use permit or special land use permit.

The City of Wheeling is aware that the judicial concern with conditional use permits lie with the unfettered discretion of those providing the permits and the concern that no clear, non-discretionary criteria is sometimes established or applied uniformly to such applicants. Until approximately ten years ago, the City utilized conditional land use permits.

The City of Wheeling wishes to utilize the ability to extend Conditional Land Use through the variance process. Pursuant to W. Va. Code § 8A-7-2, which provides considerations when enacting a zoning ordinance, section:

W. Va. Code § 8A-7-2(c)(5) permits as follows:

Adopt procedures and requirements for conditional use permits. The governing body of the City of Wheeling would use the procedure for enactment of zoning ordinance found in W. Va. Code § 8A-7-5, which includes publication public hearing, and the ordinance process.

The ability to institute the proposed conditional land use by the City of Wheeling is also inherently recognized by the legislature as it was included in the definitions section during the 2004 amendments; however there appears to be no procedural area in the land use code where a Body or Commission would consider such use. Therefore, the City of Wheeling would propose utilizing Home Rule Authority to interpret the code by allowing the BZA the ability to consider Conditional Use Permits as it had authority to do so in the past. See **W. Va. Code § 8A-1-2:**

(d) “Conditional use” means a use which because of special requirements or characteristics may be permitted in a particular zoning district only after review by the board of zoning appeals and upon issuance of a conditional use permit, and subject to the limitations and conditions specified in the zoning ordinance.

The City of Wheeling would use the process, as it had previously done a decade ago, by taking such applications for conditional land use permits to the board of zoning appeals (BZA) with established criteria. The City needs the application of Home Rule Authority to implement this form of land use as it is not fully included in the current land use statutes although as demonstrated herein it appears to be an available tool for municipal land use but there is no statutory mechanism to do so.

The City of Wheeling would use a modified version of W. Va. Code § 8A-7-11 when reviewing Conditional Land Use Permit Applications, which is the section of the statute concerning a variance request. The proposed modification would permit the BZA to hear conditional land use permit applications that may involve permitting land uses that are otherwise prohibited in the zone. Currently this section of code would not allow the BZA to do so.

Again the City of Wheeling would utilize City Council work sessions to comprise the conditions and parameters of the permits in conjunction with the Development, Planning and Zoning and Legal Departments. Such things Wheeling would like to consider would be that the conditions placed upon an application for a conditional use would expire if the original applicant ceases to operate or utilize the premises as provided in the conditional land use application. This would allow for a continuing ability to review whether or not the proposed conditional use of such property serves the goals of the community at different dates in time or changes of ownership. The criteria for the conditions would also be in codified ordinance form.

C. Existing Non-Conforming Uses – Continuation and Extinction

Prior to the 2004 amendments the City of Wheeling, and all municipalities had a much clearer standard as to continuation and the extinguishing of non-conforming uses. The City of Wheeling, being that the prior (pre-2004 legislation) statute still controls our land use regulation as previously discussed, still utilizes the older version of the West Virginia Code concerning existing non-conforming uses which did not mandate any time period for abandonment.

The City of Wheeling proposes to have the ability to continue using the prior, older code language with a minor modification that only enhances to clarify the statute by making the extinguishing of a non-conforming use definitive. The City would propose continuing its use of the language found in West Virginia Code since 1959 as follows:

W. Va. Code § 8-24-50. Existing uses safeguarded

Such zoning ordinance or ordinances shall not prohibit the continuance of the use of any land, building or structure for the purpose for which such land, building or structure is used at the time such ordinance or ordinances take effect, but any alteration or addition to any land or any alteration, addition or replacement of or to any existing building or structure for the purpose of carrying on any use prohibited under the zoning rules and regulations applicable to the district may be prohibited: Provided, That no such prohibition shall apply to alterations or additions to or replacement of buildings or structures by any farm, industry or manufacturer, or to the use of land presently owned by any farm, industry or manufacturer but not used for agricultural, industrial or manufacturing purposes, or to the use or acquisition of

additional land which may be required for the protection, continuing development or expansion of any agricultural, industrial or manufacturing use. If a nonconforming use has been abandoned, any future use of such land, building or structure shall be in conformity with the provisions of the ordinance regulating the use in the district in which such land, building or structure may be located: Provided, however, That abandonment of any particular agricultural, industrial or manufacturing process, shall not be construed as abandonment of agricultural, industrial or manufacturing use.

Nothing contained in this article shall be deemed to authorize an ordinance, rule and regulation which would prevent, outside of urban areas, the complete use and alienation of any timber and any and all minerals, including coal, oil and gas, by the owner or aelien thereof. For the purpose of this section, urban area shall include all lands or lots within the jurisdiction of a municipal planning commission as defined in this article.

Acts 1959, c. 118; Acts 1969, c. 86; Acts 1983, c. 152; Acts 1984, c. 130.

The legislation of 2004 truly eroded decades of solid municipal land use case law which is relied upon not only by municipal governing bodies and their legal counsel, but by those persons who municipal government serves. The law, for almost fifty (50) years, established prior to the legislative changes of 2004, provided for a “grandfathering” of existing uses but also provided for extinguishing such uses and prohibited expansion of any non-conforming uses. Pursuant to Home Rule Authority, the City of Wheeling would like to continue utilizing the older statutory language concerning non-conforming uses and the extinguishing of same and would present options to its City Council as to any definitive time for abandonment of a non-conforming use. The prior state law relied upon case law for interpretation and the City has used as general guidelines a six (6) month period of time and in other cases one (1) month of non-use for abandonment purposes and immediate extinguishing in cases where a particular non-conforming use establishment, such as a bar, house of prostitution/drugs, etc., when the property has been found by the governing body to be a permanent public nuisance. The City of Wheeling would like the local authority to establish the abandonment time period.

The current statutes not only provide no assistance to municipalities concerned with non-conforming uses but the statutes establish ridiculously lengthy one (1) year periods of non-use (See W. Va. Code § 8A-1-2(g)) and are so very vague as to place the burden on the municipality to prove that there has been no abandonment unless the City proves that a property owner is *without intention of transferring rights to the property or resuming the non-conforming use for a one (1) year period* ... (See W. Va. Code § 8A-1-2(a)). The burden of proof placed upon the municipality to prove what another party “intended” to do with the property is almost an impossible burden and non-conforming uses would continue rather than extinguish in cases where the land use should revert to that of the surrounding property. Also, W. Va. Code § 8A-7-10(c)(d) provides the property owner with an indiscriminate amount of time to come back – after one year – to show that the property hasn’t been abandoned. The new legislation also allows for expansion and alteration of non-conforming uses which has never been statutorily permitted in the past.

The City of Wheeling asks that it be given Home Rule Authority to control the proliferation of non-conforming uses and still maintain a defensible position concerning the extinguishing of such non-conforming uses. As stated in the many West Virginia Supreme Court of Appeals cases, that recognize that some non-conforming uses may be permitted to continue until abandoned but may not

be expanded. (See end notes following § 8-24-39). The City of Wheeling believes that it should be relieved of the unreasonable language in the new legislation of 2004 regarding abandonment and grandfathering exceptions to non-conforming uses and that it should be able to continue the reliance on prior statutes and case law even if there are future amendments and modifications to the City's well established and developed land use regulations. The City believes that the municipal government is best situated to decide the extinguishing period of abandonment of non-conforming uses which lie within the community. As well, and as previously proposed earlier, the ability to have conditional use permits issued provides another option for property owners, the governing body and the community to reassess the existence and continuation of these non-conforming use properties.

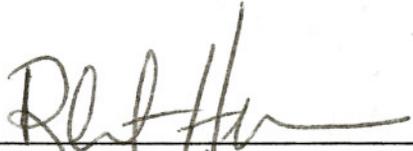
As the enabling statute at W. Va. Code § 8-1-5a(f)(5) suggests, the City of Wheeling wishes also to have its plan proposal be interpreted in a flexible manner which may permit amending its plan, if chosen as a pilot municipality. W. Va. Code § 8-1-5a(f)(5) provides that the Board may authorize amendments to approved plans. The City of Wheeling understands that amendments which vary the initial proposals may need to proceed procedurally as do tax increment financing plan amendments, which require a public hearing and an amending ordinance, etc. However, the City wishes to have an ability, if the Home Rule Board believes that such flexibility is permitted to present new proposals or amendments to its plan for the Board to consider during the initial term of the program. This could provide the City with further opportunities to explore other potential areas not specifically identified herein where Home Rule Authority may be applied in the City of Wheeling. As well there may be ideas or proposals from other municipalities that, if chosen as a pilot municipality, the City of Wheeling may wish to implement if feasible during the pilot time frame.

CONCLUSION

The City of Wheeling is very flexible in its approach to the proposals provided herein and believes the City has the capability in utilization of human resources and within budgetary parameters to accomplish a successful application of the Home Rule Pilot Program Statute. The City of Wheeling hopes to have an opportunity to have its plan reviewed, evaluated, and is open to discussing any and all recommendations of the Board to the proposed plans submitted by the City. The City will consult with state agencies affected by the proposed plans as needed or requested and will work with the Board on the approved plan either as submitted or modified.

In closing, this is an exciting opportunity wherein the City of Wheeling wishes to be a part. Wheeling is prepared to make the commitment necessary so that the goals of responsibly increasing the powers of municipal self government as expressed by the legislature, the Home Rule Board and other municipalities who may not currently be applicants will be achieved.

Respectfully submitted,



The City of Wheeling
by and through its City Manager Robert Herron

Dated: 12-19-07



The City of Wheeling
By and through it's Mayor, Nick Sparachane

Dated: 12-19-07