

Proposed Amendment to the City of Morgantown Home Rule Application

I. Introduction

The City of Morgantown (the “City”) has been approved to participate in West Virginia’s Municipal Home Rule Pilot Program, Phase II (“Home Rule Program”) and its initial written plan has been approved by the Municipal Home Rule Board (the “Board”).

Pursuant to *W. Va. Code* § 8-1-5a(l), “[a] municipality selected to participate in the Municipal Home Rule Pilot Program may amend its written plan at any time.” The Board has provided guidance for municipalities proposing plan amendments, which require a public hearing and statement of the reasons for amendment similar to those required in an initial plan under *W. Va. Code* § 8-1-5a(f) and (g).¹

The City seeks to amend its written plan to propose ordinances granting its fire marshals additional authority – including the authority to make arrests for certain specific violations of the Fire Prevention Code – to effectively address ongoing problems with fire prevention. The applicable laws and reasons for amendment are set out below.

II. Specific Laws Applicable

West Virginia Code sections 8-15-1, 29-3A-1 to -3, and 8-14-3.

III. Limitations Presented by Applicable Law

The City’s large population of university students – equivalent in number to full-time residents - creates increased difficulties enforcing the Fire Prevention Code provisions prohibiting overcrowding of structures; fire marshals are faced with numerous bars and house parties that create unsafe structural loads, and the occupants are often combative and unwilling to obey orders to restore proper occupancy levels. In addition, the City suffers incidents of street and dumpster fires on par with large cities such as Columbus and Los Angeles.² These problems require enforcement measures that demand the fire prevention expertise of the City’s Fire Marshals and more enforcement officers than are available in a police force in a city the size of Morgantown.

The City’s power to extinguish and prevent fire is created by *W. Va. Code* § 8-15-1, which states, “The governing body of every municipality shall have plenary power and authority to provide for the prevention and extinguishment of fires[.]” The section provides a

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http://www.wvcommerce.org/App_Media/assets/images/commerce/wvhomerule/forms/2014_MHR_Amend_Plan_Procedure091714.pdf

² See National Fire Incident Reporting System summary and Morgantown Fire Department statistics, attached as Exhibit 1.

nonexclusive list of actions the City may take in pursuit of the power but contains no specific statement that fire marshals may make arrests.³ In response to a State Fire Commission inquiry, the West Virginia Attorney General's office construed *W. Va. Code* § 8-15-1, standing alone, to permit the City to grant fire marshals limited law enforcement authority.⁴ However, the opinion is limited to consideration of *W. Va. Code* § 8-15-1 and expressly does not address the impact of other statutory or constitutional provisions.

Other statutory provisions provide specific powers to local firefighters, *W. Va. Code* § 29-3A-1 to -3, and allow the State Fire Marshal the authority to grant certain arrest powers to deputized fire marshals, *W. Va. Code* § 29-3-12, but neither specifies that local firefighters may arrest based upon municipal authorization.⁵ In addition, *W. Va. Code* § 8-14-3 may be construed to vest all municipal arrest powers in the police department. It provides as follows:

The chief and any member of the police force or department of a municipality and any municipal sergeant shall have all of the powers, authority, rights and privileges within the corporate limits of the municipality with regard to the arrest of persons, the collection of claims, and the execution and return of any search warrant, warrant of arrest or other process, which can legally be exercised or discharged by a deputy sheriff of a county.

Id. The City recognizes that where a reasonable doubt exists as to the City's authority, the courts will find the authority does not exist. *Hyre v. Brown*, 102 W. Va. 505, 135 S.E. 656 (1926). Because the statutory provisions granting the City's power to prevent and extinguish fire and the firefighters' powers and duties do not specifically grant arrest powers, and because other statutory provisions do specifically grant police arrest powers, the City could be found not to have the authority to grant fire marshals arrest powers under current law. The City wishes to avoid the threat of litigation and assure its fire marshals can act with sound authority by seeking approval of the Board.

³ The full text of *W. Va. Code* § 8-15-1 is as follows:

The governing body of every municipality shall have plenary power and authority to provide for the prevention and extinguishment of fires, and, for this purpose, it may, among other things, regulate how buildings shall be constructed, procure proper engines and implements, provide for the organization, equipment and government of volunteer fire companies or of a paid fire department, prescribe the powers and duties of such companies or department and of the several officers, provide for the appointment of officers to have command of fire fighting, prescribe what their powers and duties shall be, and impose on those who fail or refuse to obey any lawful command of such officers any penalty which the governing body is authorized by law to impose for the violation of an ordinance. It may give authority to any such officer or officers to direct the pulling down or destroying of any fence, house, building or other thing, if deemed necessary to prevent the spreading of a fire.

Id.

⁴ See West Virginia Attorney General Opinion dated December 5, 2014, attached as Exhibit 2.

⁵ Copies of these provisions are attached as Exhibits 3 and 4, respectively.

IV. Proposed solution

Upon approval of the Board, the City will adopt an ordinance permitting fire marshals to arrest any individual disobeying lawful orders at the scene of a fire and any individual who the Fire Prevention Code provisions prohibiting malicious burning, obstructing a fire marshal, or failure to obey orders. Incident to the arrest powers, the fire marshals would have authority to obtain and serve warrants for violations of these provisions. A copy of the proposed ordinance is attached as Exhibit 5. The Morgantown Fire Department and Morgantown Police Department have made arrangements for the fire marshals to be given initial and annual training that will comply with *W. Va. Code* §§ 30-29-1 *et seq.*, if the written plan amendment and ordinance are approved by the Board.

Adoption of the ordinance is expected to allow the City's Fire Marshals to better prevent chronic overcrowding conditions that endanger individuals' safety and to enforce Fire Prevention Code provisions designed to inhibit furniture and street fires. Limiting these fires and overcrowding will prevent property damage suffered by City residents and preserve City resources for other important municipal services.