

FAIRFAX COUNTY RESPONSE
TO
RESTON CITIZENS ASSOCIATION PROPOSAL

TO INCORPORATE
A NEW TOWN GOVERNMENT
IN THE RESTON AREA

WITH RESTON CITIZEN ASSOCIATION COMMENTS IN RED ITALICS

2 November 2005

NOTES ON A PROPOSAL TO INCORPORATE A NEW TOWN GOVERNMENT IN THE RESTON AREA

The Reston Citizens Association ("RCA") proposes to incorporate a new town government in the area of the County known as Reston. Briefly stated, the RCA proposes to utilize the existing boundaries of Small District No.5, the special tax district that now supports the activities of the Reston Community Center, as the boundaries of a new town. The proposed town would utilize the structure and the powers typically available by charter to Virginia town governments, and they recommend using the Charter of the Town of Clinchco, Virginia, as a model for the charter of the new town government. These notes consider a number of aspects of that proposal.

RCA: The Fairfax County notes apply to an early version of the RCA proposal for a town and draft charter. The current RCA proposal and draft legislation addresses many of the issues raised by the County. Significant changes to the documents compared to those reviewed by the County include:

- The charter is now modeled on the 1980 Charter that the County agreed to permit to go to the legislature. The legislature permitted a referendum on that charter.*
- The charter now proposes the same boundaries as in 1980. These boundaries include only the Reston Association, the Reston Town Center Association, and Deepwood, not the outlying areas of Tax District No. 5. This results in a decrease in the tax base of about \$750M from the Tax District No. 5 base of roughly \$12B.*
- The charter provides for only the Real Estate Tax and the Property Tax as taxes for the new town. Additional taxes are subject to agreement by the County. This eliminates all issues in this document associated with tax revenue being taken away from Fairfax County, with the exception of about \$1.7M associated with the Transient Occupancy Tax and the Bank Franchise Tax. In the case of these two taxes, if a town exists, then only the town can collect part or all of these taxes. Under the current proposed charter, the town would negotiate with the County on these two taxes, and could choose to levy the taxes and remit them to the County for services provided or take over an equivalent value of County services.*

*RCA did not ask for an evaluation of that version of the proposal. RCA did ask for specific information regarding finances. That information, along with significant additional commentary, is provided in a separate document, **Revenue and Expenditure Analysis of the Proposed Town of Reston**, which can be found on the RCA website.*

1. Present Legal Constraints

Two provisions of Virginia law would bar any such proposal. First, Virginia Code § 15.2-817 provides that no unincorporated area within a county having the urban county executive form of government shall be incorporated in such a county. Second, Virginia Code § 15.2-3602(A)(6) provides that no unincorporated area shall be formed into a town if the proposed town is within a county that has a population density of more than 200 persons per square mile. Because Fairfax County has adopted the urban county executive form of government, and because Fairfax County meets that population threshold, a new town cannot be formed within the boundaries of Fairfax County.¹

RCA: The current charter would need to be passed as special legislation, requiring a 2/3rds majority of both houses of the legislature, to override this restriction. A similar charter passed in 1980.

2. Present Proposal

Briefly stated, RCA proposes that (1) the General Assembly enact legislation that will provide for the formation of a town government using the boundaries of Small District No.5, (2) a referendum be conducted in Small District No.5 on whether to adopt the new town government, and (3) once the new town is established, then the new town government would assume (i) the facilities and functions of Small District No.5, including any outstanding credits and debts, and (ii) the maintenance of various areas now owned and maintained by various associations of private property owners. The proponents also assume that the County continue to provide full County services to the area within the new town, e.g., provide fire and rescue services, libraries, police, and schools, issue building permits and inspect buildings, and review site plans and subdivision plats, and provide staff support for some aspects of planning and zoning that may be done by the County under contract.² RCA also proposes that the new town will

1. The proponents are aware of these restrictions, and they intend to seek special legislation to overcome these statutory limitations.

2 The new town would have to retain certain legislative functions, e.g., adoption of a comprehensive plan, adoption of a zoning ordinance and amendments thereto, and adoption of a subdivision ordinance, because those would be nondelegable legislative functions. However, the new town may want to use County staff to provide administrative support for certain land use functions. In regard to governmental functions, the (Footnote continues)

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use revenues from various sources to provide supplemental programs and to maintain the common areas that are now maintained by private associations of homeowners. As a benefit, the proponents have claimed, and these notes will later dispute, that after the formation of the new town, and after the town's assumption of responsibility for maintaining common areas, homeowners' associations dues would be largely replaced by property tax payments for similar maintenance and that such tax payments would then be deductible on the federal and state income tax returns.

RCA: As mentioned above, the current charter boundaries are those of the 1980 Charter. The RCA town proposal suggests that the most efficient approach to providing services within the town is for the town to provide the parks and recreation and cultural services now provided by the Reston Association and the Reston Community Center (Tax District No. 5). This is not a necessary feature of the town of Reston and would depend on successful negotiations with the RA and the County. Similar negotiations would occur with the Reston Town Center Association and Deepwood, both property owners associations independent of RA. The RCA proposal does not contemplate the use of eminent domain to acquire any property currently owned by a property owners association. Any takeover and operation of "cluster" property by the town would likely be well into the operation of the town and would be on a case by case basis. So far as we can tell, these notes do not "later dispute" that the property tax collected to run the town, including maintaining town-owned common property, would be tax deductible.

3. Mandates on Town Governments

In Virginia, towns offer a flexible governmental structure, and Virginia law imposes relatively few mandates on what services and functions a town is required to provide. More specifically, Virginia towns are required to: (1) pay their county to conduct town elections, and if the Clinchco model is used, that would mean May elections every four years; (2) produce an annual financial report; (3) establish a planning commission, and in the case of a town in the Reston area, a zoning ordinance; (4) adopt and enforce a comprehensive plan, a subdivision ordinance, sediment and erosion control ordinances, and enforce the Uniform Statewide Building Code; and (5) develop and implement a solid waste management plan. Towns are not required to provide a police force, but larger towns, like Herndon and Vienna, typically have a police force.

Because of such few mandates, the size and scope of Virginia town governments vary widely. Many small towns, like Clifton, offer very few services, but large towns, like Blacksburg, offer extensive governmental services. Until such a new town actually would elect a mayor and town council and begin operations, it is not possible to know exactly what the new town would do. And what the new town might or might not do would greatly affect the citizens of the new town, the citizens of the County, and the County government and its programs.

RCA: The RCA proposal does not contemplate forming a town police department or duplicating County services. The services and functions required above are either already provided by the RA staffs or a Reston version can be adapted from an existing service or document. While it is true to say that the precise services a town would offer are up to the town council, the current charter places substantial restrictions on which services would be offered without the approval of the County, as did the 1980 Charter.

4. General Powers

The review of the potential impact of a new town in the Reston area cannot be limited to the descriptions of the plan presented by RCA. The impact of such a proposal must be considered in light of the potential functions and services that a new town could undertake. If the Clinchco model is used, then the new town would have all the powers available to cities and towns provided by Virginia Code §§ 15.2-1100 through 15.2-1132. These general powers would permit the town to acquire property by gift, purchase, or condemnation, and to operate a wide range of facilities, programs, and services.

County and the town could enter into an intergovernmental agreement, by ordinance, for the joint exercise of certain powers. The County has such agreements with several localities. The Board would have the discretion to decide whether or not the County provided any such services by agreement.

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One of the powers conferred by the Clinchco model deserves special comment. Virginia Code § 15.2-1102 provides, in part, that the grant of powers contained in the charter is not exclusive and that the town "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 [town] 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. . . ." This broad power is available in charters only to selected localities, and it can be characterized as an override of the Dillon Rule of strict construction of the local government powers. This authority is broader than the more limited health, safety, and welfare powers available to Virginia counties pursuant to Virginia Code § 15.2-1200.

RCA: There are substantial restrictions on the services that a town would offer without approval of the county. The other broad powers are available to all other towns in Counties in Virginia. It is not clear what the County concern is, given the current charter restrictions.

5. County and Town Revenues

The new town would have the power to impose property taxes on real and personal property that would be in addition to the County real and personal property tax levies, and it also would have broader power to raise certain other revenues. More specifically, it would be able to impose taxes on admissions, cigarettes, restaurant meals, and transient occupancy without the restrictions that now apply to counties. The new town also would be able to impose certain taxes that would supersede similar County taxing powers. For example, if the town were formed and if the town chose to impose a business, professional occupational and license ("BPOL") tax, then those town BPOL taxes would supersede those County BROL taxes now imposed on businesses in the Reston area. The town also would have/the power to supersede or intercept other County taxes on: (1) transient lodgings; (2) consumer utilities; (3) cigarettes; and (4) motor vehicle decal fees. The new town also would be able to claim a share of the County's revenues from the Commonwealth from the retail sales and use taxes, the bank franchise tax, and profits and licenses from the sale of alcoholic beverages. The County estimates that if the new town imposed those taxes, then the County revenue losses from the town's "interception" of these revenues and from reallocations of state aid would be \$22.6 million per year.³

In regard to the total revenues and expenses of a new town in the Reston area, the Department of Management and Budget has made an estimate of its annual budget requirement, based on experiences of the Towns of Herndon and Vienna, and using per capita cost estimates for services and excluding costs for those Towns for police services, which the RCA does not propose to provide. With those assumptions, the Department estimates that the new town could expect to require a budget in the range of \$49.9 million to \$59.3 million. More specifically, if a new town in the Reston area were to enact a real

³ RCA has indicated that it would want the County to continue to provide County services, but whether the Board of Supervisors would be willing to maintain such services in view of these revenue reductions is an open question. County staff can be expected to recommend service reductions to generate savings that would be commensurate with the amount of revenues that would be lost by the County.

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property tax rate of \$0.11 per \$100, as suggested in the ResTOWN document,⁴ and then the new town were: (1) to adopt a BPOL tax, a consumer utility tax, a transient occupancy tax, and a bank franchise tax; (2) assume the fees collected at the Reston Community Center; (3) impose a town motor vehicle license requirement; (4) and take its share of the retail sales and use taxes and the alcoholic beverage licenses and profits, then the new town could expect to collect an estimated \$35.5 million. Of that amount, all but \$13.3 million from the town real property tax would be taken at the expense of County revenues, as described above. These estimates suggest a revenue shortfall of approximately \$14.4 million to \$23.8 million per year, which would have to be made up by having a higher real property tax rate than anticipated or by offering relatively fewer services than the Towns of Herndon and Vienna offer.

RCA: The current charter restricts taxing authority for the town to the supplementary Real Estate and Personal Property taxes, eliminating the concerns raised about taking revenue from Fairfax County. The current charter also restricts the services that can be offered without County approval. The fundamental difference between the RCA and the County estimates for the cost of service for a town of Reston is the assumption that a town of Reston would provide similar services, except police, to the towns of Vienna and Herndon. In fact, the principal proposed services are exactly the ones currently provided within Reston. The main additional services are the mayor and town council and coordination of activities among the various elements of the Reston community. These are not costly services. If authority for a referendum were passed, there would be ten months to further analyze these issues. If the voters of Reston are not comfortable with the results of the analysis, they can reject the town in the referendum.

6. Town Debt

The new town also would have broader power to raise funds for the financing of capital projects than the County. Specifically, the governing body of the new town generally would be able to issue town general obligation debt without prior voter approval, but voter approval generally is required for the issuance of bonds by either the County or Small Tax District No.5.

RCA: The proposed charter includes the same power to raise funds as the other towns in Virginia. While this power was restricted in the 1980 Charter, the current proposed tax base of over \$11B makes it reasonable to grant this power to the town outright. There is a limitation on bonds of 10% of the total assessed value of a locality, so there is a statutory limit on the debt that could be issued.

7. Land Use, Planning, and Zoning

Virginia law would require a new town government in the Reston area to have a planning commission, to adopt a comprehensive plan, to adopt a subdivision ordinance, to adopt zoning regulations, to have a board of zoning appeals, and to enforce the Uniform Statewide Building Code. The new town would operate under the same land use laws that apply generally to the County and other Virginia localities, but the details of the new town's plans and zoning could vary from present County requirements. If the town were to adopt revised zoning requirements, then existing land uses could continue as nonconforming uses in the new town, but the owners of such nonconforming properties may have difficulty in securing loans and mortgages on such nonconforming property. Finally, as a town with a population of more than 3,500, the new town would have representation on the Northern Virginia Regional Commission.

RCA: The current charter allows only an advisory planning and zoning function, as did the 1980 charter. Since Reston is a community of 60,000, it seems appropriate for Reston to have representation on the Northern Virginia Regional Commission.

8. Small District No. 5

Small District No. 5 is a sanitary district that was formed by the Board in 1975, pursuant to a provision in the urban county executive form of government, for the purpose of acquiring, constructing, and operating a community center and recreational

⁴ The ResTOWN document proposes a real property tax rate of \$0.11, which is intended to generate revenues for the new town and to replace the special levy of \$0.052 now imposed within Small District No. 5 to support the Reston Community Center. As will be discussed later, the Board would not be required to cede the recreational facilities of Small District No. 5 to the new town government.

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facilities within the District. That district funded the construction of the Reston Community Center with an *ad valorem* levy on real property within the District. The District continues to own that facility and to support the Center and its many activities.

RCA assumes that the new town government would take over the recreational facilities and programs now operated by the Center, including any outstanding credits and debts. Virginia Code § 21-119.1 would permit the Board to transfer all jurisdiction and control over Small District No.5 to the new town, but Virginia law would not require the Board of Supervisors to cede its interest in the Center to the new town. The Board would have the option to continue to operate Small District No.5 and to impose the special levy that now supports the Center.

RCA: Reston residents paid for the facilities and RCA believes it would be fair for those facilities to transfer to the town, and efficient to combine the staffs of the RCC and the majority of RA. However, achieving agreement with the County on the future of the RCC is not necessary to have a referendum on the town charter. If an agreement cannot be reached prior to the referendum, it may have an impact on the success of the referendum. But it may also be necessary to have a town council in place to conduct the negotiations necessary to determine whether the tax district would continue or be absorbed by the town as RCA has proposed. In discussions between RCA and residents outside the proposed town boundaries but within the tax district, the residents have indicated that they do not oppose the tax district being dissolved and its functions incorporated into the town.

9. Roads

Virginia Code § 33.1-224 generally provides that whenever an incorporated town has a population of more than 3,500 persons, all roads, streets, and bridges in such town shall be eliminated from the state secondary system, and control and jurisdiction over such roads shall be vested in the town government. Also, towns of more than 3,500 persons are given an allocation of construction funds from the Virginia urban system highway. However, there are a number of statutes that would permit contractual arrangements between the Virginia Department of Transportation and the new town, *see, e.g.*, Virginia Code § 33.1-42, so it is not possible at this time to know the extent of the highway costs and responsibilities that would be required of the new town. Also, whether the state funding would be adequate to pay for the costs of maintaining those roads is an open question that is beyond the scope of this Office. Any such estimate of the costs and revenues would require a detailed analysis of the number of roads and the condition of the roads in the proposed new town.

RCA: The current charter provides that the provisions of Virginia Code § 33.1-224 would not take effect within the Town of Reston unless there were agreement between the town and the county that they would do so.

10. Franchises

Virginia towns can issue franchises to providers of telecommunications services and to providers of cable television services for the use of public property and public rights-of-way. However, because the businesses that provide those services in the Reston area already have franchises from the Commonwealth and/or the County to provide such services, the new town government would have very limited authority to change or modify those existing franchises.

RCA: All the franchises have termination dates and new telecommunications technologies continue to be developed that could be franchised in the future. In the case of the Comcast cable franchise, the franchise is limited to roughly the proposed Town of Reston within Fairfax County. It may be appropriate to transfer the franchise to the proposed town.

11. City Status

A new town government in the Reston area could then become an independent city if the town later decided to petition the Circuit Court for a referendum on such a change and if the voters of the town then approved of the transition to city status. If the new town later became a city, then it would be fully responsible for the provision of all

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public services, including fire, police, and schools.⁵ However, the constitutional officers and the functions of those officers now shared by the County and the City of Fairfax, *e.g.*, the Courts and the Commonwealth's Attorney, can be expected to continue and provide service to both the County and the new city. Finally, if the town were to become a city, then there would be a court procedure to determine the cost to the new city of assuming any County facilities that would be transferred to the new city, *e.g.*, public buildings, including schools, and sewer lines. Such proceedings generally are contested vigorously by the involved localities.

RCA: The current charter prohibits Reston from becoming a city.

12. County Savings

The exercise of some town powers could be expected to provide some limited savings to the County. For example, the new town would be expected to handle its own zoning, land use regulation, site and subdivision plat review, and site inspections. That would result in some workload savings to the County, but, since these generally are feesupported activities, the change in these workloads should not be a significant financial issue for the County General Fund. Also, because the Reston Community Center is supported largely by revenues generated by Small District No.5 and not from General Fund appropriations, if the Board were to cede jurisdiction and control of the Center to the new town, as discussed above, then that change would not materially affect the County General Fund.⁶

RCA: The current charter provides for only advisory planning and zoning functions unless additional powers are requested by the town and approved by the County, so initially the savings would not apply. RCA agrees that the disposition of the Reston Community Center should have no significant impact on the County General Fund.

13. Problems with the RCA Proposal

There are two major problems with the RCA proposal. First, RCA makes a principal assumption that the new town government would take over the land and the maintenance of common areas now owned and maintained by an association of private landowners known as the Reston Association. This change would remove many major functions of this organization, and it would place the common areas of the Reston Association, and presumably the common areas of other homeowners' associations within Small District No.5, such as Deepwood, under town control. The basic problem here is that the new town could not maintain such private property, so, in order to maintain those common areas, the new town would first need to acquire an ownership interest in the property of the Reston Association by purchase, gift, or eminent domain.

⁵ The County now provides a number of different services to the Cities of Fairfax and Falls Church by intergovernmental agreement, and both of those Cities formerly were towns within the County. If the new town were later to become a city, one could expect there might be one or more intergovernmental service agreements between the new city and the County, but there is no assurance now that some services, like public schools, would continue to be provided in the future by the County to the new city.

⁶ All revenues from the Small District No.5 tax levy are spent on the activities of the Center. The County General Fund is not reimbursed for administrative overhead costs incurred in support of the District, *e.g.*, human resources, legal support, payroll, and purchasing. If the Center is conveyed to the new town government, then the new Town would have to supply that administrative support, and the County administrative support could be redirected to other needs.

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However, the Reston Association cannot convey its property to a public agency, like the new town government, without the approval of at least two-thirds of the votes of the Category A and B Members voting in a referendum in which at least 40 percent, by voting power, of such members participate. Article IV, Section IV.2(f) of the Reston Covenants, as amended. Obtaining approval from that number of its membership may be very difficult to achieve. Many homeowners might not want to open up their private recreational facilities to the public, and persons who do not itemize their federal and/or state income tax returns would see no benefit from the proposal. Also, those who fear higher taxes that would be possible within a new town and the uncertainty of the new government might be inclined to oppose any such voluntary transfer. This would require the new town to condemn the open areas that it seeks to maintain. The town would have to pay fair market value for such acquisitions, but ascertaining the value of those properties would be difficult. Given that a new town would not have cash reserves, the new town could be expected to issue general obligation bonds for the purchase price.

In any event, whether the land was acquired by purchase or by condemnation, it would take an undetermined amount of time and money for the new town to acquire the common areas of the Reston Association, and some of the common areas probably would not be suitable for acquisition as public property of the new town, e.g., those private streets and parking areas now maintained by many smaller "cluster" homeowners' associations within the Reston area. Residents of those clusters would be expected to continue to pay such cluster association dues for the maintenance of their private streets and parking areas - even though such residents also will be liable for a property tax imposed by the new town.

Second, while RCA appears to advance a relatively modest proposal, there can be no certainty as to what the new town government might actually do. Such a new town would become - virtually overnight - the most populous town in Virginia. And given the history of citizen activism in the Reston area, and the tax base and other resources that would be available to a new town, it is fair to assume that the new town would take steps to provide a wide range of government facilities and services. And as the new town was setting up its operations, there would be a time of governmental uncertainty until the new town ordinances, policies, and procedures were drafted and put in place. For example, the new town would need (1) to employ a staff with a wide range of skills and backgrounds; (2) to adopt personnel policies; (3) to establish new facilities, programs, and procedures; and (4) to draft, advertise, and adopt ordinances for the town on the subject of animals, motor vehicles, personnel policies and retirement, taxes, subdivision requirements, zoning, and many other things.

RCA: As indicated above, the transfer of RA and RCC to the town are in RCA's view the most efficient way to operate the town, but they are not a component of the proposed legislation and could be done at any point after the town was established. Transferring RA property and functions has a clear benefit to most homeowners in Reston, who do deduct taxes. Transition to an ad valorem tax from a fixed assessment has a clear benefit to residents living in less expensive properties, who are less likely to deduct taxes. Spreading the cost of community infrastructure across the full tax base, not just the residential tax base, has a clear benefit to all Reston homeowners. All these changes increase the fairness, and for most individual homeowners, decrease the cost, of supporting Reston's shared infrastructure. Reston's pools and tennis courts are open to all RA residents today, and we are a very diverse community. Anyone can have access to RA pools and tennis courts for a fee, and to RA's 55 miles of pathways for free. We see no reason for concern in opening up these facilities to everyone - they already are. We do not see cluster resources moving to the town except on an exception basis. The Reston Association successfully held a referendum on Fairfax County taking over the Southgate Community Center and met the restrictions of a 40% vote and a 2/3rds majority. The benefits to most homeowners will be greater than those associated with Southgate. The current staffs of RA and RCC are highly competent and cover many, although not all, of the skills needed. There may be selected areas where town ordinances are needed, but since Fairfax County ordinances would continue to apply, enacting town ordinances can proceed at an appropriate pace.

15. Final Comment

With a change in law, it would be possible to establish such a town, but the uncertainty of what a town might do and the great efforts required to set up such a town must be weighed against the need for a new government in the Reston area. In order to carry the day, the proponents of such a new town must be able to argue persuasively that

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there are existing critical governmental shortcomings that can only be addressed by the establishment of a new town government. Ultimately, whether this proposal obtains support from the citizens of the Reston area and from the elected officials who represent that area will require a political decision and not a financial or a legal decision. However, given that the Reston area already receives a wide range of quality local government services from the County and from Sanitary District No.5, it is difficult to understand how the proponents of a new town can successfully argue that there is a need for such a town.

RCA: The case for a town is made in the RCA proposal, and is revised based on additional input from the citizens of Reston as RCA continues to provide a forum for town discussion. Our June 22 letter to Supervisor Hudgins explains in depth why, while agreeing that Fairfax County provides excellent services, we believe Reston should be a town. It would be unfortunate if the unknown authors of this County study did not have access to that letter, which has been available on the RCA website since last summer. A further reference is the 1979 Report of the Joint Subcommittee Studying Community Government in Urbanizing Counties to the Governor and the General Assembly of Virginia. There are additional documents on our web site attesting to the strong interest in becoming a town throughout the history of Reston. Finally, with whom are we supposed to argue? Our contention, given a charter that avoids removing taxes from the county, or duplicating county services, is that that argument should be among ourselves. That is why we are asking the county to interpose no objection to such a referendum, based on the legislation we proposed on November 2. The package you have responded to was never expected to be the legislation that would go to the legislature. We thank you for your comments, and look forward to a rapid discussion, if one is needed, before entry of legislation to the 2006 legislative session.