

TOWN OF SMITHSBURG, MARYLAND

ORDINANCE NO. 2022-02

**ORDINANCE AND RESOLUTION TO DECLARE INVALID RESOLUTION NOS.
2019-04, 2019-05, 2019-06, 2019-07, 2021-01 and 2021-02**

RECITALS

On October 1, 2019 the Council of the Town of Smithsburg introduced four Resolutions in an attempt to amend Sections 31-8 (*President and vice-president of council*), 31-37 (*Vacancies*), 31-41(*Clerk-treasurer*) and 31-42 (*Clerk Treasurer as a department head*) of the *Charter of the Town of Smithsburg* (the Charter). Each of the Resolutions stated an “Effective Date” of November 20, 2019. No Petition for Referendum was filed in connection with any of those Resolutions.

On June 14, 2021 the Council of the Town of Smithsburg introduced Resolutions in an attempt to amend Sections 31-8 (*Quorum*) and 31-9 (*President and vice-president of council*) of the Charter. Each of the Resolutions stated an “Effective Date” of August 25, 2021. No Petition for Referendum was filed in connection with either of those Resolutions.

The validity of the above referenced Resolutions and Charter amendment attempts has been questioned. Specifically, the validity of the Resolutions purporting to amend Sections 31-8 and 31-7 have been reviewed by the former Town Attorney, Jason Morton and private attorney William Wantz as well as current Town Attorney, Edward L. Kuczynski who has reviewed and evaluated the validity of all of the aforementioned Resolutions. In addition, the Town has requested that the Maryland Attorney General’s office to render an Opinion. To date, no opinion has been issued by that office. Rather than continue to attempt to function as a municipal corporation in the face of the questions that have been raised, the Mayor and Council have decided to address the issues at hand in a pro-active fashion to bring an end to the ongoing uncertainty and confusion that currently exists.

No question exists that the procedures that the *Annotated Code of Maryland* (the Code) seems to indicate are mandatory were not followed by the Town of Smithsburg in connection with the 2019 Resolutions. Specifically, no advertisement was published 21 days in advance of a public hearing, and no public hearing was held. In addition, the Resolutions were not filed with the Department of Legislative Services (DLS) until February 3, 2020 – well after the specified time frame. Also, the sheet attached to the DLS filing indicates that the “Date of Passage” was 11/20/2019 – not October 1, 2019. Read literally, the stated date of passage as certified by the Town Manager seems to have occurred after the published notice of passage reflecting October dates. This error could cause confusion by an interested person researching the Resolutions. Finally, the Code requires publication within 40 days of passage for 4 consecutive weeks in a newspaper of general circulation in the Town. The Certificate of Publication reflects 3 print Notices and 4 “HM Online” publications. The Statute requiring publication does not currently authorize “online” publication. The failure to publish 4 times in print at present constitutes non-compliance with the Code.

The passage of the 2021 Resolutions is also flawed which brings their validity into question. Although a proper advertisement was placed and a public hearing was held prior to the passage of the 2 Resolutions, no post-passage publication (in print or otherwise) occurred, and the Resolutions were not posted at Town Hall. The DLS form was filed in a timely fashion on 8/25/2021.

The Statutory Requirements relating to the amendment of Charter Amendments by municipalities by their mandatory language seem to require strict adherence to the procedures. The Maryland appellate court decisions involving the interpretation of those Statutes require an analysis of whether any error was one of form or one of substance. Read together, the cases involving the validity and/or invalidity of attempted Charter Amendments stand for the propositions that – 1. The legislature controls the methodology by which charter amendments are effectuated; 2. The word “shall” must be viewed in the context of the intent of the legislature and the facts and circumstances of each case; and 3. Substantial/substantive deviations from the specified notice, publication, posting and hearing requirements will result in an invalid resolution and a failed charter amendment.

In connection with the herein identified Resolutions, the Mayor and Council find that substantial and substantive deviations from the specified notice, publication, posting and hearing requirements have resulted in invalid resolutions and failed charter amendments.

Since October 1, 2019, two (2) vacancies in the connection with the position of Mayor have occurred and currently Donald Souders has been serving as the sworn Mayor following the resignation of Mayor Richard Hetherington which occurred on August 3, 2021. Council member James Fritsch is currently serving as Vice-President of the Council since Council member (and former Vice-President of the Council) Donald Souders assumed the duties of Mayor. The position of Mayor will be decided in the upcoming General Town Election scheduled for May 10, 2022. As a result of the determination and declaration contained in this Resolution and Ordinance, no vacancy on the Council exists.

The Mayor and Council, after considerable review and consideration, have determined that the procedural errors/failures involved in the aforementioned attempts to amend the *Charter of the Town of Smithsburg* through the 2019 and 2021 Resolutions identified herein were procedurally flawed and ineffectively enacted and that those failures to adhere to the Statutory procedure set for the in the Code were substantial and substantive – not merely matters of form.

As a result, the Mayor and Council have determined that **RESOLUTION NOS. 2019-04, 2019-05, 2019-06, 2019-07, 2021-01 and 2021-02** have been and continue to be invalid. In order to resolve the ongoing question of invalidity, it is the intent and the desire of the Mayor and Council of the Town of Smithsburg, as its duly constituted legislative body, to pass this Resolution and Ordinance to formally declare the aforementioned Resolutions relating to the purported Charter Amendments invalid, void and of no force and effect and to take other action necessary to address and further resolve the past and ongoing governance of the Town of Smithsburg from October 1, 2019 forward.

The Mayor and Council believe that the enactment of this Ordinance and the actions taken hereunder are in the best interests of the citizenry and in furtherance of the stable and consistent governance of the Town of Smithsburg.

RESOLUTION AND ORDINANCE

NOW, THEREFORE, BE IT RESOLVED, ENACTED AND ORDAINED, that the **RECITAL** set forth above is incorporated herein by reference as if fully set forth and is made substantive part of this *Resolution and Ordinance*; and it is further

RESOLVED, ENACTED AND ORDAINED, that *Resolution 2019-04* is hereby declared ineffectively passed and thereby invalid, ineffective, null and void; and it is further

RESOLVED, ENACTED AND ORDAINED, that *Resolution 2019-5* is hereby declared ineffectively passed and thereby invalid, ineffective, null and void; and it is further

RESOLVED, ENACTED AND ORDAINED, that *Resolution 2019-6* is hereby declared ineffectively passed and thereby invalid, ineffective, null and void; and it is further

RESOLVED, ENACTED AND ORDAINED, that *Resolution 2019-7* is hereby declared ineffectively passed and thereby invalid, ineffective, null and void; and it is further

RESOLVED, ENACTED AND ORDAINED, that *Resolution 2021-1* is hereby declared ineffectively passed and thereby invalid, ineffective, null and void; and it is further

RESOLVED, ENACTED AND ORDAINED, that *Resolution 2021-2* is hereby declared ineffectively passed and thereby invalid, ineffective, null and void; and it is further

RESOLVED, ENACTED AND ORDAINED, that *Resolutions 2019-4, 2019-5, 2010-6 and 2019-7* are hereby declared and deemed invalid as of October 1, 2019 (no pre-introduction advertisement and/or public hearing); and it is further

RESOLVED, ENACTED AND ORDAINED, that *Resolutions 2021-1 and 2021-2* are hereby declared invalid as of July 6, 2021 (the expiration of 40 days after introduction with no publication or posting); and it is further

RESOLVED, ENACTED AND ORDAINED, that the provisions of the *Charter of the Town of Smithsburg* as they existed prior to October 1, 2019 remain unchanged and have continued to control the governance of the Town and the actions of the Mayor and Council both before and after October 1, 2019; and it is further

RESOLVED, ENACTED AND ORDAINED, that since the resignation of Mayor Richard Hetherington, who served as Mayor after the resignation of Lloyd “Jack” Kesselring on the 5th day of February 2021 until his resignation on the 3rd day of August, 2021. Council Member Donald Souders, who was elected by the Council to serve as Vice-President of the Council after the resignation of Mayor Richard Hetherington, has served and acted as Mayor of the Town of Smithsburg pursuant to *Section 31-8 of the Charter of the Town of Smithsburg* as same existed on and before October 1, 2019; and it is further

RESOLVED, ENACTED AND ORDAINED, a Mayoral vacancy exists, and Donald Souder's service as Mayor shall continue, with full powers, duties and responsibilities as defined in the Charter, until the vacancy is filled in accordance with the Charter and/or through the General Town Election scheduled for the 10th day of May 2022; and it is further

RESOLVED, ENACTED AND ORDAINED, that no vacancy on the Council currently exists; and be it further

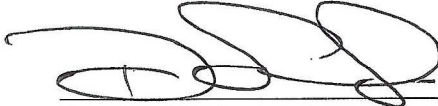
RESOLVED, ENACTED AND ORDAINED, that the election of Council Member James Fritsch as Vice-President of the Council was unnecessary and of no effect based upon the terms and provisions of the Charter as same existed on or before October 1, 2019. Council Member James Fritsch by his signature to this *Resolution and Ordinance* hereby acknowledges same and/or hereby resigns the Vice-President position; and it is further

RESOLVED, ENACTED AND ORDAINED, that all of the actions of the Mayor and/or Council acting in his/her/their various capacities pursuant to the Charter as it currently exists and as it existed on October 1, 2019, assuming same were not *ultra vires*, are hereby approved, re-approved, ratified and/or confirmed; and it is further

RESOLVED, ENACTED AND ORDAINED, that following a new Mayor at the next General Election of the Town being elected and taking office, Donald Souders shall be returned to his position of Council Member and Vice-President of the Council for the duration of his term and he shall serve as Vice President of the Council until his successor is duly elected following said election.

WITNESS AND ATTEST



Chad Rooney, Town Manager


Donald Souders, Mayor


James Fritsch, Council Member


Cassandra Weaver, Council Member


Tracey Knight-Simane, Council Member


David Dan, Council Member

Date of Introduction: March 15, 2022

Date of Passage: March 22, 2022

Effective Date: April 11, 2022