

# THE RUTHERFORD INSTITUTE

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July 9, 2012

Via Email (cshelton@williamsburgva.gov)

Christina W. Shelton, City Attorney  
City of Williamsburg  
401 Lafayette Street  
Williamsburg, Virginia 23185-3617

**Re: Proposed Ordinance #12-14**

Dear Ms. Shelton:

Thank you for forwarding a copy of Proposed Ordinance #12-14 and the associated explanatory memorandum dated July 5, 2012.

We have reviewed the proposal and find it to be superior to the earlier draft. While the revised proposal is obviously less restrictive of free speech rights and provides objective criteria that are devoid of subject matter regulation, it is not without problems. Specifically, two key problems need to be addressed, namely the proposed ordinance's lack of exemptions for religious and political speech, as well as its granting of unfettered discretion to the City Manager to legislate sound levels.

Concern #1: The proposed ordinance lacks necessary exemptions for "public speaking," "public assembly activities," and "religious services, religious events or religious activities or expressions"

The new proposal removes the prior ordinance's exemption for "public speaking" and "public assembly activities," as well as the exemption for "religious services, religious events or religious activities or expressions." These precious rights of free speech and religious freedom are what the founders who met in Williamsburg fought to protect, and which previous Williamsburg City Councils have recognized to be worthy of specific protection on Williamsburg's streets and sidewalks. Now, based on objections from a few for-profit interests that have implemented outside dining in Merchant's

Square—and apparent animus toward certain speech with which some persons disagree—the City is poised to consider these protections as unworthy of exemption, notwithstanding the historic role of Williamsburg in contributing to their birth.

It is not without irony that the City of Williamsburg, the seat of Colonial protest and debate about rights of free expression and religious freedom initially penned by Virginians George Mason and James Madison, now proposes to revoke its previous recognition of the importance of political and religious speech, whereas the neighboring City of Virginia Beach has a specific blanket exemption in its noise ordinance for “religious or political gatherings to the extent those activities are protected by the First Amendment to the United States Constitution.” Virginia Beach City Code, Sec. 23-69 (d)(7).<sup>1</sup>

Notwithstanding the pressure of commercial and intolerant interests, Williamsburg should continue to set the standard for a vibrant community that not only protects the freedoms prized so highly by our Founders but celebrates them. Thus, it would be wisest for the City Council to maintain in the proposed ordinance the specific exemption for public assembly and religious gatherings to the extent those activities are protected by the First Amendment to the United States Constitution.

Concern #2: By granting unfettered discretion to the City Manager to legislate sound levels, the proposed ordinance could be considered unconstitutional

The new draft of the ordinance is problematic in light of its new exemption for “sound generation which occurs within limits specified in a special permit .... issued by the City Manager.” The effect of the exemption is to grant unfettered discretion to the City Manager to legislate sound levels according to personal predilections based on the event and the speech in question. Such unfettered discretion has long been recognized as unconstitutional (*see Forsythe County v. Nationalist Movement*, 505 U.S. 123, 133 (1992); *Niemotko v. Maryland*, 340 U.S. 268, 273 (1951)), and may very well pose a substantial legal problem for the City.

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<sup>1</sup> Sec. 9-39(a) of the Williamsburg Code does allow that “no short term permit or long term license shall be required for the lawful picketing or other orderly procession involving freedom of expression by the First Amendment of the United States Constitution on the sidewalks or other public-right-of-way not used for the movement of vehicular traffic consisting of not more than 20 persons and which takes place between the hours of 9:00 a.m. and 9:00 p.m.,” but this merely provides a *very* limited exemption from the permit process, and *no* exemption from the restrictive sound levels in the proposed ordinance which in the context of a public gathering would be unduly restrictive.

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A much better solution would be for the City Council to retain in its list of noise ordinance exemptions—as has Virginia Beach—an exemption for “religious or political gatherings to the extent those activities are protected by the First Amendment to the United States Constitution.”

We commend the City Council for its willingness to reconsider this ordinance in light of the concerns previously raised, and hope that members will carefully reassess the current proposal in light of these comments. It must be noted, however, that no matter what course the City Council chooses to follow, whether it be to recognize, regulate, or exempt, the constitutional protections of the First Amendment supersede any local statutory constraints and, as such, will have to be applied in a constitutional manner.

Rest assured, The Rutherford Institute remains ready to assist the City and its residents in maintaining the Constitution’s assurances of free speech, assembly, religious expression and equal protection under the law.

Sincerely yours,



John W. Whitehead  
President

cc: Clyde Haulman, Mayor  
Paul Freiling, Vice Mayor  
Scott Foster, Council Member  
Douglas Pons, Council Member  
Judith Knudson, Council Member