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CONSTITUTIONAL LAW

*Mark J. Yeager**

I. INTRODUCTION

On February 27, 1998, the Supreme Court of Virginia rendered its decision in *Town of Madison v. Ford.*[1] The court invalidated a town zoning ordinance which had been enacted in 1972. This extreme result was due to an insufficiency in the town council's minutes at the meeting when the ordinance in question was enacted. The minutes did not state the names of all the members present nor how they voted. The court, therefore, found that the ordinance was enacted in derogation of the provisions of article VII, section 7 of the Constitution of Virginia ("section 7").[2]

Section 7, which addresses the recordation of final votes to enact local ordinances, was interpreted previously at the state level on two occasions by the Attorney General's office, shortly after the 1971 constitutional revision.[3] Unfortunately, those opinions were faulty, and local governments which have relied

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1. 255 Va. 429, 498 S.E.2d 235 (1998). Senior Justice Whiting wrote the majority opinion and was joined by Justices Hassell, Keenan, and Koontz. Justice Compton wrote the dissent which was joined by Chief Justice Carrico and Justice Lacy.

2. The current version of the Constitution was proposed by S.J. Res. 23, Va. Gen. Assembly (Ex. Sess. 1969). The resolution was referred to the 1970 Session where it was again agreed upon by H.J. Res. 13, Va. Gen. Assembly (Reg. Sess. 1970). The resolution was ratified by the people on November 3, 1970 and is often referred to as the 1971 Constitution because it did not take effect until the following year. The text of Article VII, section 7 is set forth in full at *infra* Section I.

3. *See* 1972 Op. Va. Att'y Gen. 43; 1974 Op. Va. Att'y Gen. 84.

on them will find that the *Ford* decision represents a rude awakening. Local ordinances of every sort, dating back to 1971, now are susceptible to attack for being null and void.

This article examines the issues raised by the *Ford* decision and acquaints the reader with section 7 and its genesis. More specifically, it examines whether the language of section 7 requires local legislative bodies to enact their ordinances by roll call vote, an issue left in doubt by the *Ford* opinion. Because most Virginia practitioners have at least some dealings that are affected by the ordinances of towns, cities and counties, this treatment hopefully will serve as a primer for those who were unfamiliar, until now, with the deceivingly simple provisions of section 7.

Section II of this article examines the facts and the holding of the *Ford* decision. Section III attempts to provide insight to the legislative intent that prompted the inclusion of section 7 into the 1971 constitution. Section IV raises and answers some of the questions related to roll call voting and other issues which remain in the wake of *Ford*. Due to the paucity of Virginia case law on the subject, this examination begins with the seminal case of *Steckert v. City of East Saginaw*,[4] which the *Ford* court relied upon in deciding *Ford*.

This article concludes that, notwithstanding a vigorous dissent, the *Ford* decision was decided correctly and that the minimal requirements of section 7 demand that local legislative bodies record the passage of ordinances either by roll call vote or a functional equivalent thereof.

II. THE *FORD* DECISION

In 1996, the Town of Madison filed suit to enjoin Carol Ford from operating two businesses on a parcel of land zoned "Residential, R-1." Using the land for business purposes violated the town's zoning ordinance. Ford, in return, filed a "special plea" seeking dismissal of the suit on the grounds that the 1972 ordinance had not been enacted by a "roll call" vote.[5] In sup-

4. 22 Mich. 104 (1870).

5. *See Ford*, 255 Va. at 437, 498 S.E.2d at 239 (Compton, J., dissenting). Roll

port of her position, she relied on article VII, section 7 of the Constitution of Virginia which states:

> No ordinance or resolution appropriating money exceeding the sum of five hundred dollars, imposing taxes, or authorizing the borrowing of money shall be passed except by a recorded affirmative vote of a majority of all members elected to the governing body. In the case of the veto of such an ordinance or resolution, where the power of veto exists, it shall require therefore a recorded affirmative vote of two-thirds of all members elected to the governing body.
>
> On final vote on any ordinance or resolution, the name of each member voting and how he voted shall be recorded.[6]

Based upon Ford's special plea, the trial court held an ore tenus hearing and considered the following to be pertinent minutes of the town council's special meeting on October 25, 1972:

> Town Council held a special meeting on the above date following the joint hearing of the Planning Commission and the Council. *All members were present* . . .
>
> Council was informed by the Planning Commission that they [sic] have approved the Zoning Ordnance [sic] . . . . Councilman Drake moved that the Town Council accept the Ordnance [sic] as presented by the Commission. *Motion* seconded by Councilwoman Johnston and *carried unanimously.*[7]

Because these minutes did not indicate the names of all the members present, the use of the term, "all members were present," was problematic. In an attempt to remedy this omission, the town introduced its records from 1971, which indicated that each named member of the Madison Town Council had given the oath of office administered by the incumbent circuit judge. Additionally, the town submitted the council minutes from its most recent "regular monthly meeting" held on October 9, 1972, demonstrating that the same five council members still held office when the ordinance passed.[8]

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call voting is a voting procedure whereby council members are called on by name and allowed either to cast their vote or to abstain.

6. VA. CONST. art. VII, § 7.

7. *Ford*, 255 Va. at 431, 498 S.E.2d. at 236.

8. *See id.* at 437, 498 S.E.2d at 239 (Compton, J., dissenting).

The trial court, in its written opinion,[9] ruled that only one of the documents was relevant—the minutes of the October 25, 1972, special meeting which enacted the ordinance.[10] Because these minutes did not record the name of each member voting nor how they voted, the trial court ruled that this violated the mandates of section 7 and held that the ordinance was void ab initio.[11] The town appealed this decision to the Supreme Court of Virginia.

Both at the trial court level and in the supreme court, the town argued, as a threshold matter, that the provisions of the second paragraph of section 7 applied only to the fiscal ordinances referred to in the first paragraph.[12] This argument was promptly dismissed by the court, which stated that "the express terms of the second paragraph make its provisions clearly applicable to all ordinances, not just those ordinances referred to in the first paragraph."[13] The town's main argument, however, required more detailed analysis.

The town contended that the ordinance was valid and in compliance with section 7 inasmuch as the minutes reflected that, "all members were present when the meeting began and that the resolution was passed unanimously."[14]

From the town's point of view, there could be "no doubt as to how each member voted."[15] The town records clearly established the identity of the council members. Thus, when the town voted unanimously to pass the ordinance, it became a matter of deductive reasoning to determine the names of each member voting and how they voted. According to the town's argument, the method of voting, at the very least, was substantially in compliance with section 7.[16]

In contrast to the town's position, Ford argued that the names of the members present and how they voted could not be

9. *See* Town of Madison v. Ford, 40 Va. Cir. 423 (Madison County 1996).
10. *See Ford*, 255 Va. at 437, 498 S.E.2d at 239.
11. *See id.* at 438, 498 S.E.2d at 239.
12. *See id.* at 432, 498 S.E.2d at 236.
13. *Id.* at 432, 498 S.E.2d at 236.
14. *Id.* Actually, the matter in question was an ordinance and not a resolution.
15. *Id.* at 433, 498 S.E.2d at 236.
16. *See id.* at 432, 498 S.E.2d at 237.

found on the face of the minutes. Accordingly, the requirements of section 7 were not met.[17]

As it began its analysis, the supreme court reiterated that the Constitution of Virginia is a charter;[18] therefore, it is the fundamental law in Virginia.[19] Further, the constitution is a restriction of governmental power[20]. Although the town had the power to enact zoning ordinances, it could do so only by following the mandate of section 7.[21]

As the court continued its analysis, it chose to decide the issue on the narrowest of grounds by asserting that if a constitutional provision is "plain and unambiguous," the court need not "construe it, but apply it as written."[22] This decision was unfortunate, especially given the four-to-three split among the justices. As will be seen, the language of section 7 is not as "plain and unambiguous" as the court asserts.

Supporting its position that the town had complied substantially with the requirements of section 7, the court cited the opinion of the Attorney General to the Honorable William B. McClung, dated September 2, 1971[23] (two months after the effective date of the 1971 version of the Constitution of Virginia). In that opinion, the Attorney General cited the second paragraph of section 7 and then quoted from McClung's letter, in order to pose the following issue:

> Whether or not the recorded vote of each individual member of the Board of Supervisors is necessary when a motion is either passed or rejected upon the *unanimous* action of the members of the Board at their regular meeting after there having been recorded in the Minutes of the Meeting the members that are present.

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17. *See id.*

18. *See id.* at 432, 498 S.E.2d at 236 (citing Coleman v. Pross, 219 Va. 143, 152, 246 S.E.2d 613, 618 (1978)); *see also* Dean v. Paolicelli, 194 Va. 219, 226, 72 S.E.2d 506, 510-11 (1952); Staples v. Gilmer, 183 Va. 338, 350, 32 S.E.2d 129, 133 (1944).

19. *See Ford*, 255 Va. at 432, 498 S.E.2d at 236 (citing Terry v. Mazur, 234 Va. 442, 449, 362 S.E.2d 904, 908 (1987)).

20. *See Ford*, 255 Va. at 432, 498 S.E.2d at 236; *Dean*, 194 Va. at 226, 72 S.E.2d at 510-11; Mumpower v. Housing Auth., 176 Va. 426, 455, 11 S.E.2d 732, 739 (1940).

21. *See Ford*, 255 Va. at 432, 498 S.E.2d at 236; Town of South Hill v. Allen, 177 Va. 154, 159, 12 S.E.2d 770, 772 (1941).

22. *Ford*, 255 Va. at 432, 498 S.E.2d at 236.

23. 1972 Op. Va. Att'y Gen. 42.

> The Board takes the position that on *unanimous* decisions after it has been recorded the members that are present and the members that are absent, that there is no question as to which members voted which way. This would certainly be a time saving device for the meetings rather than have each individual member that is present say that he either voted for or against a particular resolution.
>
> An example of what I am referring to would be the situation where a resolution was made, seconded, and then *unanimously* passed by the Board after a voice vote[24] in which all the members responded affirmatively. Thus the record would show that all of those members, including the Chairman, who were present had voted for the particular action.[25]

Although the above cited "question" was not cited by the supreme court in the *Ford* decision, it is important to do so here because the Attorney General's response cannot be understood outside the context of that question. The question to the Attorney General assumed that all members would be recorded at the beginning of a Board meeting. The question also assumed that those same members would remain present until the particular ordinance in question was put to a vote. Most importantly, it assumed that all members would vote (i.e., signify their position as opposed to, abstaining on the record, or merely remaining silent). Finally, the question illustrated the misconception that the term "unanimous"[26] means that everyone voted the same way.

Notwithstanding the problems inherent in the question, the Attorney General responded as follows:

> The part of Section 7, Article VII, of the Constitution above quoted is new language. It requires the recording of the names of members of a governing body and how they voted on any final action taken by the governing body.

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24. A voice or *viva voce* vote is one in which there is a call for all those in favor to say "aye" and those opposed to say "no". The chair then determines from what he hears, which side has more votes. *See* Shalersville Bd. of Educ. v. Horner, 9 N.E.2d 918, 921 (Ohio Ct. App. 1936).

25. 1972 Op. Va. Att'y Gen. 42-43 (emphasis added) (footnote added).

26. *See infra* note 41 and accompanying text.

> In applying this provision to your inquiry, I am of the opinion that the recorded vote of each individual member of the board is not necessary when a motion is either passed or rejected upon the *unanimous* action of the members at their regular meeting after there has been a recording in the minutes of the meeting of the members who are present. In such circumstances the names of the members and how they voted is recorded.[27]

After citing the second paragraph of the Attorney General's response, the supreme court in *Ford* merely held that this opinion did not support the town's position.[28] Writing for the majority, Justice Whiting, stated:

> Although suggesting a formal roll call vote is not necessary, the opinion is clearly predicated on the assumption that "there has been a recording in the minutes of the members who are present." In the minutes at issue, the names of only three of the four council members[29] are stated. Additionally, for the reasons articulated later, the notation in the minutes that "the motion . . . carried unanimously" does not necessarily indicate that each of those council members voted in favor of the motion.[30]

This analysis of the Attorney General's Opinion is somewhat incomplete, however. The court's comments merely distinguish the opinion from the facts in *Ford* by observing that, in his opinion, the Attorney General assumed that there was a record of those present. The court did not address, in this analysis, whether the term "members who are present" referred to the beginning of the meeting, as implied by Mr. McClung's letter, or whether it referred to the point in time when the vote was taken; this distinction is important.[31] Perhaps, however, of greater importance is what the court failed to say about the Attorney General's opinion.

This opinion, issued only a few months after the effective date of the 1971 constitutional revision, was the only official

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27. 1972 Op. Va. Att'y Gen. 43.
28. *See Ford*, 255 Va. at 429, 498 S.E.2d at 235.
29. The fifth member was the mayor.
30. *Ford*, 255 Va. at 433, 498 S.E.2d at 237 (footnote added).
31. *See generally* Steckert v. City of East Saginaw, 22 Mich. 104 (1870).

interpretation of section 7 until the mid 1990s.[32] When the first published circuit court opinions on this topic arose in 1995, the local governments relied almost solely on this Attorney General's opinion in every case.[33] Indeed, the opinion even was cited, without comment, in Professor A.E. Dick Howard's treatise, *Commentaries on the Constitution of Virginia.*[34] There simply is no way of reckoning the number of local jurisdictions which relied upon this opinion in enacting their ordinances. The *Ford* decision will not be the last case to interpret section 7 in this context.

After disposing of the Attorney General's opinion, the court in *Ford* examined the three cases cited in support of the town's position: (i) *Goodyear Rubber Co. v. City of Eureka,*[35] a California case in which the minutes naming the councilmen present recorded the vote by stating that all present voted in favor of the resolution; (ii) *Brophy v. Hyatt,*[36] a Colorado case wherein the vote on the measure reflected the names of six members voting in favor with none opposed; and (iii) *Hammon v. Dixon,*[37] where the Arkansas Supreme Court upheld an ordinance that named the members of the council and noted that the named members present all voted in favor of the ordinance. The court easily was able to distinguish these three cases from

32. *See, e.g.*, City of Fairfax v. Rose, No. 121438 (Fairfax County May 24, 1993) (invalidating a DWI ordinance on the basis of its non-compliance with section 7 when minutes named council members present at inception of meeting; ordinance was passed "unanimously"); Commonwealth v. Nugent, No. M087840 (Fairfax County May 8, 1995) (invalidating a similar Fairfax County ordinance).

33. In *Commonwealth v. Payne*, 36 Va. Cir. 227 (Fairfax County 1995), a circuit court judge upheld the validity of the same ordinance which had been invalidated in *Rose*, by relying solely upon the Attorney General's opinion. The first published opinion which examined the legislative history of section 7 and found that there was a requirement for roll call voting was Judge Arthur B. Vieregg's opinion in the case of *Commonwealth v. Adams*, 40 Va. Cir. 38 (Fairfax County 1995) (minutes reflected that all ten members of the Board were present at the beginning of the meeting and motion to enact ordinance was passed "by a vote of 7" but three members were out of the room at the time of the vote). Subsequently, a second published circuit court opinion was decided, citing Judge Vieregg's opinion with approval. *See* Commonwealth v. Jordan, 40 Va. Cir. 87, 91 (Rappahannock County 1995) (minutes reflect passage "unanimously").

34. 2 A.E. HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 847 n.10 (1974).

35. 67 P. 1043 (Cal. 1902).

36. 15 P. 399 (Colo. 1887).

37. 338 S.W.2d 941 (Ark. 1960).

the instant case. Unlike the situation in *Ford*, each of the three cases involved a record which indicated clearly the names of those members present at the time of the vote. The court, however, did not discuss whether the facts in these cases would pass muster under section 7. Nevertheless, on the question of what recording is necessary to establish the names of each member voting, the Supreme Court of Virginia made one point specifically clear—the names of the members comprising the legislative body may not be inferred from records not related to the ordinance in question,[38] but, rather, must be contained in the records relating to the ordinance itself.[39]

The interpretation of section 7 that requires the recordation of the members present at the time of the vote is well founded in law and common experience throughout the country. Indeed, the town cited no case in which this type of recordation was absent. This result is not surprising because strict recordation requirements, at least when dealing with the passage of local ordinances, have been recognized consistently since 1870, with Justice Cooley's opinion for the Supreme Court of Michigan in *Steckert v. City of East Saginaw*.[40] More than a century later, Judge Cooley's analysis reappeared in the supreme court's analysis in *Ford* which was cited at length:

> Now if it were a legal presumption that all the members who were present at the call to order of such a meeting remained until its adjournment, and that no others came in and took their seats afterwards, and if it were also a pre-

38. Dissenting in *Ford*, Justice Compton, argued that the other documents admitted into evidence at trial were sufficient to establish the names of the members of the town council. Indeed, the dissent stated that, "the constitutional provision nowhere specifies that only the minutes of the meeting in issue may be considered to sustain the ordinance." *Ford*, 255 Va. at 439, 498 S.E.2d at 240 (Compton, J., dissenting).

39. Replying to the dissent, Justice Whiting observed that:

> [t]he dissent reads this constitutional provision as permitting evidence of "the names of each member voting and how he voted" to be gleaned from other unrelated documents, at least one of which was prepared in the year before the council allegedly adopted the ordinance. We think that the constitutional provision clearly requires that this information be recorded either in the minutes adopting the ordinance or in some contemporaneous document referencing the adoption of the ordinance.

Id. at 435-36 n.1, 498 S.E.2d at 238 n.1.

40. 22 Mich. 104 (1870).

> sumption that every member voted on each resolution on roll call, the argument of the [town council] would be complete, and we could say with legal certainty from this record that these resolutions were passed with the affirmative vote of each of the members named as present in the clerk's minutes of the meeting in question.
>
> But surely there are no such presumptions of law, and if there were, they would be contradictory to the common experience of similar official bodies. It is very well known that it is neither observed nor expected that when a legislative body of any grade has commenced its daily session, the doors will be closed to prevent the ingress of members not prompt in arrival, or the egress of others who may have occasion to leave. The actual attendance on such a body will frequently be found to change materially from hour to hour, so that a record that a vote was passed unanimously would be very slight evidence that any particular member present at the roll-call voted for it, or that any member not then present did not . . . Moreover, the members actually present are usually allowed to vote or not to vote at their option, . . . and if the vote of a quorum is in favor of a resolution and no vote is cast against it, the record may still be that it was *"adopted unanimously on call,"* though some of the members present abstained from voting.[41]

The court in the *Steckert* decision clearly advocates the use of "roll call" voting by local legislative bodies,[42] a position that the Supreme Court of Virginia in *Ford* was not required to adopt. Yet, the above-cited passage nevertheless served a dual purpose. The passage not only emphasized the requirement for recording the names of the members voting *at the time* when the vote in question is being taken, but it also demonstrated

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41. *Ford*, 255 Va. at 434, 498 S.E.2d at 237 (citing *Steckert*, 22 Mich. at 108-09) (emphasis added). The *Steckert* decision has been cited with approval in many jurisdictions. *See, e.g.*, Nelson v. State ex rel. Axman, 83 So.2d 696, 698 (Fla. 1955); City of Rome v. Reese, 91 S.E. 880, 881 (Ga. Ct. App. 1917); Pontiac v. Axford, 12 N.W. 914, 915 (Mich. 1882); Bruder v. Board of Educ., 224 N.W. 268, 270 (Minn. 1929); Village of Beverly Hills v. Schulter, 130 S.W.2d 532, 537 (Mo. 1939); Monett Elec. Light, Power & Ice Co. v. City of Monett, 186 F. 360, 368-69 (C.C.D. Mo. 1911); Hand v. School Dist., 2 N.W.2d 313, 315 (Neb. 1942); Union Bank v. Commissioners of Oxford, 25 S.E. 966, 968 (N.C. 1896); Picton v. City of Fargo, 88 N.W. 90, 96 (N.D. 1901); Board of Educ. v. Best, 39 N.E. 694, 697 (Ohio 1894); Shalersville Bd. of Educ. v. Horner, 9 N.E.2d 918, 921-22 (Ohio Ct. App. 1936); Finney v. Shannon, 6 P.2d 360, 362-63 (Wash. 1931).

42. *See Steckert*, 22 Mich. at 112-13.

the fallacy of equating the term "unanimous" with the notion that all members present voted for the proposition in question—a fatal flaw in the Attorney General's opinion relied upon by the Town of Marion. To that end, the supreme court merely had to cite *Black's Law Dictionary*: "To say that a proposition was adopted by a "unanimous" vote does not always mean that every one present voted for the proposition."[43]

In applying the principles of the *Steckert* decision to the *Ford* case, Justice Whiting stated:

> Since there is no presumption that all members remained in the meeting from the time it convened until the vote to adopt the ordinance was taken, we cannot determine which council members were present for the vote or who actually voted to adopt the ordinance. Additionally, the recitation of a unanimous vote does not necessarily indicate that all council members present actually voted in favor of the adoption of the ordinance.[44]

Accordingly, the Supreme Court of Virginia could not determine from the minutes of the town which members were present at the time of the vote or, if present, whether those members actually voted as opposed to abstaining or merely neglecting to vote. Because this state of uncertainty as to the record clearly violated section 7, the supreme court held that the zoning ordinance in question was null and void.[45]

III. THE LEGISLATIVE HISTORY OF SECTION 7

Thus far, the provisions of section 7 have been discussed only within the context of the *Ford* decision. In that context, the

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43. 255 Va. at 435, 498 S.E.2d at 238 (citing BLACK'S LAW DICTIONARY 1523 (6th ed. 1990)). The supreme court also cited PAUL MASON, MANUAL OF LEGISLATIVE PROCEDURE FOR LEGISLATIVE AND OTHER GOVERNMENTAL BODIES § 516, at 201 (1975); VIRGINIA SCHLOTZHAUER et. al., PARLIAMENTARY OPINIONS 91 (1982); J.R. Kemper, Annotation, *Abstention From Voting of Member of Municipal Council Present at Session as Affecting Requisite Voting Majority*, 63 A.L.R.3d 1072 (1975).

44. *Ford*, 255 Va. at 435, 498 S.E.2d at 238.

45. *See id.* at 435-36, 498 S.E.2d at 238 (citing McClintock v. Richlands Brick Corp., 152 Va. 1, 24, 145 S.E. 425, 431 (1928) (holding that a municipal ordinance in conflict with state constitution is void)).

Supreme Court of Virginia chose not to "construe" the language of this constitutional provision because it believed that its language was plain and unambiguous.[46] Yet, such plain language was obviously misconstrued by the Attorney General's office in its 1972 opinion. That opinion, in turn, was mistakenly relied upon not only by the Town of Madison, but other jurisdictions, as well.[47] Indeed, the dissent in *Ford* argued that no constitutional provision requires the contemporaneous recording of the names of council members, much less, requires a "roll call" vote.[48] Much of this confusion could have been avoided if the Attorney General, in the first instance, had researched the genesis of section 7.

Every state in the United States has some provision for keeping a journal of legislative proceedings. Many of these provisions follow the form set forth in Article I, Section 5 of the United States Constitution which states in pertinent part: "Each House shall keep a Journal of its Proceedings . . . and the *Yeas and Nays* of the Members of either House on any question shall, at the Desire of one fifth of those present, be entered on the Journal."[49]

In his *Commentaries on the Constitution of Virginia*, Professor A.E. Dick Howard states:

> It was not until 1851 that the Virginia Constitution provided for a journal of proceedings. That provision required that each house keep a journal, published from time to time, in which the yeas and nays on any question were to be recorded at the request of one-fifth of those present. Except for stylistic changes, this provision remained unchanged until the revision of 1969.[50]

In analyzing legislative journals and constitutional provisions relating to the enactment of laws or ordinances, it is important to understand that the terms "yeas and nays" and "roll call" vote are synonymous. According to *Robert's Rules of Order*:

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46. *See id.* at 432, 498 S.E.2d at 236.

47. *See supra* notes 32-33 (discussing cases relying upon the 1972 Attorney General's opinion).

48. *See Ford*, 255 Va. at 438, 488 S.E.2d at 240 (Compton, J., dissenting).

49. U.S. CONST. art. I, § 5, cl. 3 (emphasis added).

50. 1 HOWARD, *supra* note 34, at 516.

> Taking a vote by *roll call* (or by *yeas or nays*, as it is also called) has the effect of placing on the record how each member votes. . . . It is usually confined to representative bodies, where the proceedings are published, since it enables constituents to know how their representatives voted on a certain measure.[51]

Prior to 1972, Virginia was governed by the provisions of the 1902 version of the Constitution of Virginia. Similar to Virginia's current constitution, the 1902 model required a journal for both the House and the Senate. This requirement was embodied in former section 49 which stated that "Each house shall keep a journal of its proceedings, which shall be published from time to time, and the yeas and nays of the members of either house on any question shall, at the desire of one-fifth of those present, be entered on the journal."[52]

Compare this language with the language previously cited in the United States Constitution. In each case, when one-fifth of the members present request it, a roll call will be taken to record the votes of each member on any given question. In this case, however, the term "any question" refers to resolutions or procedural issues, not legislation.

The next section, section 50, described the procedures for enacting legislation. Section 50 read, in pertinent part that "[n]o bill shall become a law unless, ...(d) A yea and nay vote has been taken in each house, upon its final passage, the names of the members voting for and against entered on the journal."[53] Accordingly, whether one-fifth of the members desired it or not, a yea and nay (or roll call) vote was always required upon the final passage of any bill before it became law. The same voting procedures were not applicable to Virginia's towns, cities and counties.[54]

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51. HENRY M. ROBERT, THE SCOTT, FORESMAN ROBERT'S RULES OF ORDER NEWLY REVISED 353 (Sarah C. Robert ed., Scott, Foresman and Company 1981) (emphasis in original); *see also* BLACK'S LAW DICTIONARY 1618 (6th ed. 1990) (defining "yeas and nays" as "[t]he affirmative and negative votes on a bill or measure before a legislative assembly. 'Calling the yeas and nays' is calling for the individual and oral vote of each member, usually upon a call of the roll").

52. VA. CONST. art. IV, § 49 (repealed 1972).

53. *Id.* at art. IV, § 50.

54. One possible exception was section 123 of the constitution, which required a

In 1969, the Commission on Constitution Revision ("CCR"), under the direction of Mills Godwin, Jr., Governor of Virginia, and Executive Director, Professor A.E. Dick Howard, prepared a report concerning a proposed revision of the Constitution of Virginia and delivered it to the General Assembly. In the introduction of the CCR Report, the Commission stated that "[s]everal linguistic changes are proposed which conform related language found in different parts of the Constitution. Again, the object is clarity. . . . [I]f no substantive change is meant to be effected by a linguistic change, the commentary so indicates."[55]

A perfect example of the "linguistic" changes introduced into the new constitution can be found in the section dealing with legislative journals. Former section 49 was kept relatively intact, albeit under the new designation—article IV, section 10, which states:

> Each house shall keep a journal of its proceedings, which shall be published from time to time. The vote of each member voting in each house on any question shall, at the desire of one-fifth of those present, be recorded in the journal. On the final vote on any bill . . . the name of each member voting in each house and how he voted shall be recorded in the journal.[56]

Article IV, section 10 of the 1972 constitution contains the first mention of the now familiar phrase, "the name of each member voting and how he voted."[57] Professor Howard, in his *Commentaries*, stated that "[t]he first two sentences of section 10, drawn from section 49 of the constitution of 1902, retain the substance of that section; the changes made by the Commission, such as substituting 'the vote of each member' for the 'yeas and nays of the member,' were stylistic."[58]

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yea and nay vote to override a mayoral veto. *See* Gill v. Nickels, 197 Va. 123, 87 S.E.2d 806 (1955) (holding that requirements of section 123 were mandatory and self-executing notwithstanding its variance with town charter).

55. REPORT OF THE COMMISSION ON CONSTITUTIONAL REVISION, H. Doc. No. 1 (1969).

56. VA. CONST. art. IV, § 10.

57. *Id.*

58. 1 HOWARD, *supra* note 34, at 516. Note also that the original section 49 did not refer to the method of recording the vote on the final passage of any bill. This language is apparently taken from former section 50(d).

Keeping with the Commission's policy regarding linguistic changes, the "stylistic" changes in article IV, section 10, were carried into other sections of the constitution. Accordingly, article IV, section 11(d) (based upon former section 50(d)) now states that a bill will not become law unless "upon its final passage a vote has been taken thereon in each house, the name of each member voting for and against recorded in the journal."[59]

Note that this provision does not include the language of former section 50, which required that, "a yea and nay vote be taken . . . in each house" because that requirement was transferred to and included in article IV, section 10.[60] Professor Howard explains:

> Until the revision of 1969, Virginia's Constitution required, in section 50 (now Article IV, section 11), that the name of each member voting and how he voted be recorded upon final passage of a bill. Otherwise, no record of votes taken on questions brought before one of the houses was required unless, under section 49 (now Article IV, section 10), one-fifth of those present requested the vote be recorded. Section 10, however, goes beyond what was required in section 49. In addition to requiring the names and votes of members to be recorded upon final passage of a bill, section 10 requires that the final vote on any bill—those defeated as well as those passed—be recorded.[61]

In light of the above, it is abundantly clear that the legislative journals of both houses of the General Assembly are required to record the "yeas and nays," notwithstanding the stylistic change of terminology to "the name of each member voting and how he voted."[62] If it were otherwise, one would have to assume that the framers of the 1972 constitution intentionally reduced that degree of accountability owed by lawmakers to their constituents. To the contrary, Professor Howard

59. VA. CONST. art. IV, § 11(d).
60. *See* 1 HOWARD, *supra* note 34, at 516.
61. *Id.* at 518.
62. *Id.* at 516.

declares that the journals are important because they "give voters a means of scrutinizing the performance of their representatives."[63]

Some dramatic changes in the 1972 constitution can be found in article VII, which is entirely devoted to local governments.[64] Although most of these changes received little fanfare in 1971, one provision, the second paragraph of section 7, has now made its significance known. Section 7 states that "[o]n final vote on any ordinance or resolution, the name of each member voting and how he voted shall be recorded."[65] As one reexamines its language, it becomes readily apparent that the authors of the constitutional revision intended that local legislators be held to the same voting and recordation requirements as those imposed upon members of the General Assembly. In commenting upon this portion of section 7 Professor Howard stated:

> [Section 7] requires the recording of names of members of a governing body and how they voted on any final action taken by that body. The requirement is identical to a provision in Article IV, section 10 requiring the General Assembly to record members' votes when taking final action on bills. By its express terms, section 7 applies to all ordinances and resolutions passed by a governing body . . . .[66]

Notwithstanding the foregoing, Justice Compton's dissent in *Ford* argued that the Town of Marion had complied substantially with section 7. He observed that when "a legislative body performs its law-making function, courts must accord the legislative action 'every reasonable presumption of validity.'"[67] While this is undoubtedly the case as a general proposition, the rule does have exceptions. Again, Justice Cooley states it most succinctly:

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63. *Id.* at 517.

64. *See generally*, Jack Spain, Jr., *The General Assembly and Local Government: Legislating a Constitution 1969-70*, 8 U. RICH L. REV. 387 (1974) (providing an overview on changes within the 1972 Constitution which are devoted to local governments).

65. VA. CONST. art. VII, § 7.

66. 2 HOWARD, *supra* note 34, at 847.

67. Town of Madison v. Ford, 255 Va. 429, 438, 498 S.E.2d 235, 239 (1992) (Compton, J., dissenting) (citing Wise v. Bigger, 79 Va. 269, 281 (1884)).

> [W]henever it is acting in the apparent performance of legal functions, every reasonable presumption is to be made in favor of the action of a legislative body; it will not be presumed in any case, from the mere silence of the journals, that either house has exceeded its authority, or disregarded a constitutional requirement in the passage of legislative acts, unless where the constitution has expressly required the journals to show the action taken, as, for instance, where it requires the yeas and nays to be entered.[68]

In addition to, or perhaps independent of, the presumption of regularity attending the actions of legislative bodies, the dissent argued that "if the procedure connected with enactment of a local ordinance is questioned, substantial compliance with constitutional or statutory provisions regarding recording of legislators' votes should be sufficient to validate the action."[69]

The dissent then cites *Hammon v. Dixon*[70] as authority—a case in which the Supreme Court of Arkansas was asked to determine the validity of a city ordinance that approved the sale of a parcel of park land. *Hammon,* however, clearly is distinguishable from the *Ford* decision. In *Hammon,* the parties argued that the ordinance in question had not been properly enacted because the yeas and nays of the aldermen had not been recorded in violation of a state statute requiring such recordation. Without going into any detail about the recordation requirement, the Arkansas court merely noted that the minutes of the council meeting recited that seven named aldermen were present and one named alderman was absent. "In recording the passage of the ordinance in question the minutes recited that all the aldermen present voted in favor of it."[71] The Arkansas court held that this recording was substantially compliant with state law, the purpose of which was to make the position of each alderman a matter of record.[72] One could argue that if

68. Tanner v. Premier Photo Serv., Inc., 125 S.E.2d 609, 615 (W. Va. 1962) (citing Thomas M. Cooley, CONSTITUTIONAL LIMITATIONS 279 (8th ed. 1927)).

69. *Ford,* 253 Va. at 438, 498 S.E.2d at 240 (Compton, J., dissenting).

70. 338 S.W.2d 941 (Ark. 1960).

71. *Id.* at 943-44.

72. *See id.* at 944.

Hammon had been litigated in Virginia, the ordinance would have been upheld under the provisions of section 7.

IV. QUESTIONS RAISED BY THE *FORD* DECISION

The Supreme Court of Virginia, through the *Ford* decision, indicated that local ordinances enacted without compliance with the mandates of section 7 are subject to being declared null and void, even years after their enactment. The *Ford* decision also implies that the names of the members voting on a particular ordinance or resolution must be recorded along with their votes, but the decision does not specify the manner in which those votes are taken or how they are to be recorded. Must the vote in question be a roll call vote in which each member casts his vote separately as his name is read by the clerk? Or can the legislation be passed by a voice vote? How must the vote be recorded in the journal? These questions are not easily answered by the *Ford* decision; yet, they are vitally important—not just for those local legislators who are sitting currently, but for those local officials who will be called upon to defend the validity of ordinances which were enacted years before the *Ford* decision.[73] This section examines these and other questions which remain in the aftermath of *Ford*.

For purposes of analysis, it is helpful to draw upon the records introduced by the Town of Marion to pose a hypothetical situation. Assume that all five members of the town council, including the mayor, are present at the commencement of a regularly scheduled meeting during which there is to be a vote

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73. It should be noted that the supreme court attempted to limit the effect of the *Ford* decision. Whereas the town had requested that any adverse ruling not be made retroactive, the court stated that "our decision today shall be limited to the present case and shall operate prospectively only. Ordinances enacted prior to this decision which were adopted with minutes containing the same deficiencies as the minutes involved in this case shall not be affected." *Ford*, 255 Va. at 436, 498 S.E.2d at 238-39 (citing City Council of Alexandria v. Potomac Greens Assocs. Partnership, 245 Va. 371, 378, 429 S.E.2d 225, 229 (1993)).

Ford, however, does not stand for the proposition that an ordinance which was enacted in violation of the constitution may be immune from collateral attack just because another ordinance with a similar defect has been struck down already by a court which desires that its ruling be prospective only. The language cited in the *Ford* decision means that future litigators will have to attack any potentially defective ordinances in court on a case-by-case basis.

on a particular zoning ordinance. Further, assume that after the motion is made and seconded, each of the five members present votes to enact the ordinance in question. Must the vote be by roll call? Justice Compton, writing for the dissent in *Ford*, appears to concede that a roll call vote is not necessary when he declares "I would conclude, first, contrary to Ford's argument, that the constitutional provision in issue does not require a roll call vote, that is, a vote 'taken by yeas and nays' . . . ."[74]

For its part, the majority only mentions the term "roll call vote" once, and then only in passing reference to the gist of the Attorney General's opinion cited above.[75] Ford argued that a roll call vote was required in her reading of section 7, but the fact that the court decided in her favor does not establish the validity of her interpretation. In short, the question remains unanswered.

As defined earlier,[76] a vote by "roll call" and a vote by the "yeas and nays" are—for all practical purposes—the same thing. *Black's Law Dictionary* defines the latter term as "[t]he affirmative and negative votes on a bill or measure before a legislative assembly. 'Calling the yeas and nays' is calling for the individual and oral vote of each member, usually upon a call of the roll."[77]

In *Steckert v. City of East Saginaw*,[78] Justice Cooley was called upon to interpret a statute[79] that required the City Council to vote by taking the "yeas and nays" before enacting certain resolutions and ordinances. A claim was made that the resolution in question was not so enacted. The minutes of the meeting at issue listed the names of the seven aldermen present. The minutes further reflected that the motion to enact the resolution was "[a]dopted unanimously on call."[80] The Supreme

74. *Id.* at 438, 498 S.E.2d at 240 (Compton, J., dissenting).

75. *See id.* at 433, 498 S.E.2d at 257 (discussing 1972 Op. Va. Atty. Gen. 42 (1971)).

76. *See supra* note 51 and accompanying text.

77. BLACK'S LAW DICTIONARY 1616 (6th ed. 1990).

78. 22 Mich. 104, 106 (1870).

79. The statute in question was the Charter for the City of East Saginaw.

80. *Steckert*, 22 Mich. at 107.

Court of Michigan invalidated the resolution. In doing so, Justice Cooley elaborated upon the virtues of roll call voting:

> What is designed by this statute is, to fix upon each member who takes part in the proceedings on these resolutions, the precise share of responsibility which he ought to bear, and that by such an unequivocal record that he shall never be able to deny either his participation or the character of his vote . . . [The legislature has] imperatively required that there should be record evidence of a character that should not be open to contradiction, or subject to dispute; and their requirement cannot be complied with according to its terms, nor satisfied in its spirit and purpose, without entries in the minutes showing who voted on each resolution embraced by this section quoted from the charter, and how the *vote of each was cast.* In other words, the ayes and noes on each resolution must be entered at large on the minutes, so that the presence or participation of any member shall not be left to conjecture or inference.[81]

Justice Cooley's analysis of this subject is logical and replete with common sense. Thus, it is no surprise many cases throughout the country dealing with this subject matter cite Justice Cooley's decision in *Steckert* with approval.[82]

One of these cases, *Pickton* v. *City of Fargo,*[83] is illustrative. In *Pickton*, the Supreme Court of North Dakota nullified a city ordinance because of its non-compliance with a statute which required that the '[y]eas and nays shall be taken upon the passage of all ordinances . . . which shall be entered upon the journal of its proceedings."[84] In *Pickton*, the relevant minutes named all eight aldermen present. The minutes further recited that, upon its final passage, the roll was called with "eight members voting '[y]ea.'"[85] The court observed that the statute which controlled the enactment of such ordinances had two

81. *Id.* at 109-10 (emphasis added).
82. *See, e.g., supra* note 41.
83. 88 N.W. 90 (N.D. 1901).
84. *Id.* at 96.
85. *Id.*

components: (i) the taking of the yeas and nays in the vote itself; and (ii) the recording of the same yeas and nays in the journal.[86] Other, often cited cases are in accord.[87]

The Supreme Court of Virginia will be asked sometime in the near future to determine whether section 7 requires both the taking of a roll call vote as well as the recording of the same in the journal (or minutes) of a local legislative body. Based upon the legislative history of section 7, as well as the authorities previously cited, the court would be justified in so finding. Indeed, one Virginia court already has ruled accordingly.[88] Until such time as the question is put to rest, local governments should consider the wisdom of taking final votes by roll call and then recording the results into their minutes. In this manner, those governments are assured that their ordinances can withstand the type of collateral attack present in the *Ford* case.

Having said this, the inquiry is not complete. First, one should appreciate the fact that the roll call vote method is time consuming, especially because common sense and observation tell us that many, if not most, issues that come before a town council or similar body are decided unanimously and often without much debate. Moreover, many local representatives are citizen-legislators who have full employment outside. Unnecessarily lengthening council meetings should be avoided. Second, assuming that the supreme court adopts a requirement of formal roll call voting, what will happen to the myriad ordinances which have been enacted heretofore by less stringent procedures?

In the previous hypothetical, five councilmen are preparing to vote upon a zoning ordinance. In the first instance, the clerk calls the names of each member and waits to record their indi-

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86. *See id.*

87. *See, e.g.*, People ex rel. Anderson v. Chicago & N.W. Ry. Co., 71 N.E.2d 701 (Ill. 1947) (refusing to speculate that the five council members recorded as present were the same five persons casting positive votes); Village of Mettawa v. Carruthers, 530 N.E.2d 537 (Ill. App. Ct. 1988) (listing five yeas, one nay and one absent could not supplement the official record to show a roll call vote); Bennett v. City of Emmetsburg, 115 N.W. 582 (Iowa 1908) (reciting the names of eight aldermen, and eight votes "for" did not suffice where no indication that the vote was taken by yeas and nays).

88. *See* Commonwealth v. Adams, 40 Va. Cir. 38, 40 (Fairfax County 1995).

vidual, oral response—a traditional roll call vote that is then recorded. In the second instance, the clerk asks for a show of hands in favor of the ordinance and all five members raise their hands. While their hands are raised, the clerk records the votes of the individuals voting. Although this is not a traditional call of the roll, is there any practical difference between the two methods of voting, taking into consideration the policy issues set forth by Justice Cooley? Going one step further, as the vote is called for by voice vote, the clerk looks at the five members as each of them says "aye" in unison. Because she has known these members for years, she easily recognizes that each of the five members has voted affirmatively and so she lists the names of the five members in the "aye" column. Is there not a record of the name of each member voting and how they voted within the meaning of section 7?

In *Brophy v. Hyatt*,[89] the Supreme Court of Colorado upheld an ordinance in similar circumstances. Colorado law relating to local ordinances required that "the yeas and nays shall be called and recorded."[90] Under Colorado law, such a requirement was mandatory, and after citing with approval the *Steckert* decision, the court recited the minutes of the meeting and ruled as follows:

> [T]he record of the board of trustees recites, respecting the adoption of the ordinance we are considering, that "upon the ballot being spread for its approval and adoption, the votes stood as follows: Ayes, W.R. Neal, C.W. Givens, L. Conley, George H. Shone, D.R. Smith, and William Sabine. Noes none." We think this sufficient. The yeas and nays were ascertained and recorded. This satisfied the essential requirements of the statute. While the usual parliamentary mode of taking such a vote is by a call of the roll, and was doubtless contemplated by the law-maker, still it is not to be regarded as essential. Any mode by which the vote of each member is clearly and definitely ascertained for the purposes of the record is sufficient.[91]

89. 15 P. 399 (Colo. 1887).
90. *Id.* at 401.
91. *Id.* at 341.

The last sentence cited is probably the most common sense approach to the entire question. In this instance, the form of the vote is not elevated above the substance of the recordation. Indeed, this result may have been foreshadowed by the *Steckert* case when Justice Cooley opined that if the record in that case had shown "precisely who voted for the resolution in question," the object of the statute would have been fulfilled, notwithstanding the lack of literal compliance.[92]

V. CONCLUSION

When the Constitution of Virginia was revised in 1971, one of its goals was to bring about linguistic clarity. In doing so, it eliminated such archaic terms as the "yeas" and "nays." While any effort to expunge "legalese" usually is worthwhile, in the case of section 7, a problem is created: "the name of each person voting and how he voted" appears too straightforward. Perhaps this is why the Attorney General's office failed to see the significance of its provisions. Unfortunately, the misconception precipitated by the 1972 opinion of the Attorney General went unchecked for more than twenty years.

Now, with the arrival of the *Ford* decision, those in local governments who failed to appreciate the historic roots of this constitutional provision will have their hands full as they attempt to salvage old ordinances which now appear suspect. The decision was extreme, but necessary. It did, however, leave unanswered questions related to roll call voting. By examining the legislative history of section 7, as well as the teachings of Justice Cooley in the landmark decision, *Steckert*, the answers to these questions can be found.

92. Steckert v. City of East Saginaw, 22 Mich. 104, 108 (1870).