

APPEAL NO. 32612

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

THORNTON COOPER,

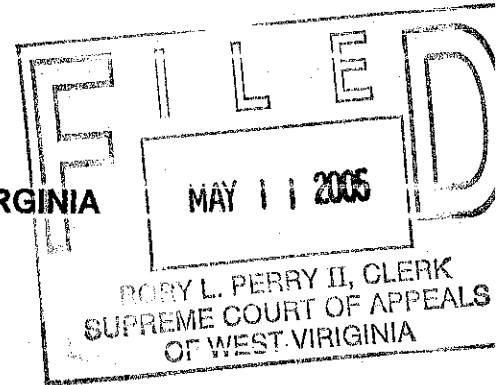
Plaintiff Below, Appellant,

v.

CITY OF CHARLESTON,
a municipal corporation,

Defendant Below, Appellee.

(An Appeal of the Order
(of June 28, 2004, by the
(Circuit Court of
(Kanawha County in
(Civil Actions Nos.
(04-C-122 and 04-C-408.



APPELLANT'S INITIAL BRIEF
SUBMITTED BY
THORNTON COOPER

THORNTON COOPER
Appellant

Pro Se

3015 Ridgeview Drive
South Charleston, WV 25303
WVSB No. 823
(304) 744-9616 (home)

May 11, 2005

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.	ii
I. KIND OF PROCEEDING AND NATURE OF RULING BELOW.	1
II. STATEMENT OF FACTS.	2
III. ASSIGNMENTS OF ERROR.. . . .	15
IV. POINTS AND AUTHORITIES RELIED UPON AND DISCUSSION OF THE LAW.	17
V. THE RELIEF PRAYED FOR.	44

TABLE OF AUTHORITIES

CASES:

<u>Calabrese v. City of Charleston</u> , 204 W. Va. 651, 515 S.E.2d 814 (1999).	29, 38
<u>City of Charleston v. Board of Education</u> , 158 W. Va. 141, 209 S.E.2d 55 (1974).	25
<u>City of Clarksburg v. Grandeotto, Inc.</u> , 204 W. Va. 404, 513 S.E.2d 177 (1998) (per curiam).	26
<u>City of Huntington v. Bacon</u> , 196 W. Va. 457, 473 S.E.2d 743 (1996).	26, 34, 37
<u>City of Moundsville v. Steele</u> , 152 W. Va. 465, 164 S.E.2d 430 (1968).	25
<u>City of Portland v. Cook</u> , 170 Or. App. 245, 12 P.3d 70 (2000), review denied, 332 Or. 56, 26 P.3d 150 (2001).	32
<u>City of Princeton v. Stamper</u> , 195 W. Va. 685, 466 S.E.2d 536 (1995).	26
<u>Clay County Citizens for Fair Taxation v. Clay County Comm'n</u> , 192 W. Va. 408, 452 S.E.2d 724 (1996).	4, 6, 27
<u>Danyluk v. Bethlehem Steel Company</u> , 406 Pa. 427, 178 A.2d 609 (1962).	27-29
<u>Dean v. Town of Addison</u> , 207 W. Va. 538, 534 S.E.2d 403 (2000).	26
<u>Ellison v. City of Parkersburg</u> , 168 W. Va. 468, 284 S.E.2d 903 (1981).	25, 26
<u>Guernsey v. Borough of Midland</u> , 197 Pa. Super. 394, 178 A.2d 782 (1962).	28, 29
<u>McCoy v. Sistersville</u> , 120 W. Va. 471, 199 S.E. 260 (1938).	19, 20, 25
<u>Miller v. Palmer</u> , 175 W. Va. 565, 336 S.E.2d 213 (1985).	20, 22, 23
<u>Nine v. Grant Town</u> , 190 W. Va. 86, 437 S.E.2d 250 (1993).	22, 23, 25
<u>State ex rel. McKenzie v. Smith</u> , 212 W. Va. 288, 569 S.E.2d 809 (2002).	21

State ex rel. Plymale v. City of Huntington, 147 W. Va. 728,
131 S.E.2d 160 (1968). 22

State ex rel. Riffle v. City of Clarksburg, 152 W. Va. 317,
162 S.E.2d 181 (1968). 22

Toler v. City of Huntington, 153 W. Va. 313, 168 S.E.2d 551 (1969). 38

Velogol v. City of Weirton, 212 W. Va. 687, 575 S.E.2d
297 (2002). (per curiam). 21, 23

CONSTITUTIONAL PROVISIONS:

U.S. Const. amend. V. 43, 44

U.S. Const. amend XIV. 43, 44

W. Va. Const. art. III, § 10. 43, 44

W. Va. Const. art. VI, § 35. 41

W. Va. Const. art. VI, § 39a. 41

W. Va. Const. art. X, § 2 (repealed 1970). 31-33

W. Va. Const. art. X, § 6. 41

W. Va. Const. art X, § 9. 43, 44

Capitation Tax Repeal Amendment. 33, 35

STATUTES:

26 U.S.C. § 6103. 40

26 U.S.C. § 7213(a). 40

W. Va. Code § 7-15-17 (1975). 27

W. Va. Code §§ 8-11-4(a). 17, 18, 20, 22

W. Va. Code § 8-11-4(a)(2). 17, 20, 22

W. Va. Code § 8-11-4(a)(3). 18, 20

W. Va. Code § 8-13-3 (1969) (repealed 1971). 32-34, 39

W. Va. Code § 8-13-5a. 23

W. Va. Code § 8-13-13 (1971). 3-5, 18-27, 30-31, 39, 42, 43

W. Va. Code § 8-13C-3 (2004). 35

W. Va. Code § 11-7-1 (1933). 32

W. Va. Code § 11-10-5d. 40

W. Va. Code § 21-5-3. 39

CITY CODE PROVISIONS:

Charleston City Code, Chapter 2. 11

Charleston City Code § 2-737. 34

Charleston City Code § 2-739(1)(c). 40

Charleston City Code § 2-740. 40

Charleston City Code §§ 2-741. 42

Charleston City Code § 2-743. 38

Charleston City Code § 2-744. 39, 42

Charleston City Code § 2-745. 34, 37

Charleston City Code, Chapter 6. 11

Charleston City Code, Chapter 110. 36

South Charleston City Code, Article 745. 4

OTHER AUTHORITY:

Willard Lorensen, "Rethinking the West Virginia Municipal Code of 1969," 97 W. Va. L. Rev. 653 (1995). 22

APPEAL NO. 32612

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
CHARLESTON

THORNTON COOPER,
Plaintiff Below, Appellant,

(An Appeal of the Order
of June 28, 2004, by the
Circuit Court of
Kanawha County in
Civil Actions Nos.
04-C-122 and 04-C-408.

v.

CITY OF CHARLESTON,
a municipal corporation,
Defendant Below, Appellee.

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF
WEST VIRGINIA:

Thornton Cooper (Mr. Cooper), the Appellant herein and Plaintiff below, hereby submits his Initial Brief in the above-captioned appeal.

I. KIND OF PROCEEDING AND NATURE OF RULING BELOW.

This is an appeal from the order issued by the Circuit Court of Kanawha County (the Honorable Judge James C. Stucky presiding) on June 28, 2004, in Civil Actions Nos. 04-C-122 and 04-C-408. Civil Action No. 04-C-122 involved a complaint for declaratory relief filed by Glen B. Gainer, III, West Virginia State Auditor (Mr. Gainer), against the City of Charleston (the City or the Defendant). Civil Action No. 04-C-408 involved a complaint for declaratory and injunctive relief filed by Mr. Cooper against the City, the Appellee herein.

In each case below, the Plaintiff therein challenged the legality of an ordinance adopted by the Defendant's City Council on September 15, 2003, that imposed a "city service fee" (the "fee"), effective January 1, 2004, in the amount of \$1.00 per calendar

week, upon tens of thousands of individuals (including Mr. Cooper) who work within the corporate limits of the City of Charleston, whether or not those individuals reside within, or own or lease real estate within, those corporate limits. After Civil Actions Nos. 04-C-122 and 04-C-408 were filed in early 2004, the two (2) cases were consolidated by the Circuit Court. After all parties had filed a stipulated evidentiary record in these cases, the City Council passed a second "fee" ordinance on June 7, 2004, in an attempt to make moot certain procedural issues that had been raised in Mr. Cooper's Complaint.

On June 28, 2004, the Circuit Court issued a final order in which it ruled explicitly or implicitly against the Plaintiffs on nearly all issues that they had raised with respect to the validity of the ordinance(s) in question. Mr. Gainer did not file a petition for appeal of that order. Mr. Cooper did file a petition for appeal, which this Honorable Court granted on April 7, 2005.

II. STATEMENT OF FACTS.

A. INTRODUCTION.

There is a stipulated evidentiary record below. The parties filed the first Joint Stipulation of Facts (JSF) and the Supplemental Joint Stipulation of Facts (SJSF) and therewith also filed, and stipulated to, Joint Exhibits Nos. 1-37. References to paragraphs in those stipulations list the stipulation (JSF or SJSF) first and then the paragraph number. For example, in this Statement of Facts, Paragraph No. 21 of the first Joint Stipulation of Facts would be abbreviated as "JSF-21".

B. INFORMATION ABOUT THE PARTIES.

Thornton Cooper is a resident of, taxpayer in, and voter in, Kanawha County, West Virginia. (JSF-1) Mr. Cooper is neither a resident of, nor a voter in or of, the City

of Charleston. He is neither the owner of, nor the lessee of, any real estate that is located within the corporate limits of the City of Charleston. (JSF-4)

The Defendant is a municipal corporation the corporate limits of which are wholly located within Kanawha County, West Virginia, and is also the state capital. (JSF-2) The City of South Charleston is another municipal corporation the corporate limits of which are wholly located within Kanawha County. (JSF-3)

Mr. Cooper is a resident of, and a voter in and of, the City of South Charleston. He is the owner and occupant of real estate that is located within its corporate limits. (JSF-5) During the 168 hours in a week, Mr. Cooper spends an average of about 70% of his time within the corporate limits of the City of South Charleston, an average of about 25% of his time within the corporate limits of the City of Charleston, and an average of about 5% of his time elsewhere. (JSF-6) As an employee of the Public Service Commission of West Virginia, an agency of the State of West Virginia, Mr. Cooper works at its offices within the corporate limits of the City of Charleston. (JSF-7)

C. DISCUSSION OF FEES IN EFFECT IN SOUTH CHARLESTON, HUNTINGTON, AND CHARLESTON AS OF AUGUST 2003.

Pursuant to W. Va. Code § 8-13-13, the City of South Charleston imposes two (2) different fees upon its residents and upon the owners and/or lessees of certain real estate located within its corporate limits. (JSF-10)

One type of fee that is imposed by a city ordinance, pursuant to W. Va. Code § 8-13-13, by the City of South Charleston, upon its residents and upon owners and/or lessees of real estate located within its corporate limits, is called the "municipal service fee". For the owners of single-family dwellings, the current fee is \$100.00 per household per year, billed quarterly. The billings for this fee are mailed to the property

owners and recite that the fee covers the collection of solid waste, street repairs and maintenance, and other city services. A copy of a billing that the City of South Charleston mailed to Mr. Cooper for this fee in 2003 is included in the joint exhibits as Joint Exhibit No. 1. (JSF-11)

The city ordinance by which South Charleston's "municipal service fee" is imposed is set forth in Article 745 of the South Charleston City Code. A copy of that ordinance is included in the Joint Exhibits as Joint Exhibit No. 2. (JSF-12) During the fiscal year running from July 1, 2004, through June 30, 2005, the City of South Charleston plans to raise about \$610,000 in revenue through this fee. (JSF-13)

The above \$100.00-per-household-per-year "municipal service fee" imposed by the City of South Charleston is quite similar to a \$25.00-per-household-per-year "emergency ambulance service fee" that was imposed in 1991 upon Clay County households by the County Commission of Clay County. This Honorable Court upheld the constitutionality of that Clay County fee in Clay County Citizens for Fair Taxation v. Clay County Comm'n, 192 W. Va. 408, 452 S.E.2d 724 (1996).

The other South Charleston fee that is imposed, pursuant to W. Va. Code § 8-13-13, upon its residents and upon owners and/or lessees of real estate located within its corporate limits, is called the "sewer fee" or "sanitary fee". This fee is billed and imposed separately by the Sanitary Board of South Charleston and is based upon water usage. The billings for this fee are mailed to customers on a monthly basis. A copy of a billing that the Sanitary Board of South Charleston mailed to Mr. Cooper for this fee in 2003 is included in the Joint Exhibits as Joint Exhibit No. 3. (JSF-14)

On the other hand, the City of Charleston, during 2003, was imposing three (3) separate fees, pursuant to W. Va. Code § 8-13-13, upon its residents and upon owners and/or lessees of real estate located within its corporate limits. These fees are called the "sewer fee", the "fire fee", and the "refuse fee". The sewer fee is based upon water usage. The fire fee is based, at least in part, upon the square footage of a building. The refuse fee appears to be based upon housing units. A combined bill for all three (3) of these fees, to the extent that they apply, is mailed to the owner or lessee of real estate on a monthly basis. A copy of part of a billing for these fees that the City of Charleston mailed in 2003 to the Appellant's elder son, Jeremy B. Cooper, who rented an apartment in that city during the summer of 2003, is included in the Joint Exhibits as Joint Exhibit No. 4. (JSF-15)

In addition to receiving revenues from the fees described above, both the City of Charleston and the City of South Charleston also receive revenues from other fees, such as fees for parking or for use of recreational facilities, that are based upon actual, consensual use of city property, from ad valorem taxes on real and personal property, and from municipal business and occupation taxes, as well as other sources. (JSF-16)

The City of Huntington enacted a "user-fee" ordinance on November 28, 2000. A copy of that ordinance is included as Joint Exhibit No. 5. That ordinance was struck down by a court order entered on May 25, 2001. A copy of that order is included as Joint Exhibit No. 6. (JSF-20)

The City of Huntington enacted a second "user-fee" ordinance on June 14, 2002. A copy of that ordinance is included as Joint Exhibit No. 7. That ordinance imposed a "fee" of \$1.00 per calendar week upon "any person who is employed within the City and

meets the requirements of a user of municipal services as defined" in the ordinance. (Joint Exhibit No. 7, p. 4) That ordinance was upheld by a court order entered on July 26, 2002. A copy of that order is included as Joint Exhibit No. 8. (JSF-20)

On March 24, 2003, the City of Huntington amended its ordinance of June 14, 2002, to increase the "fee" in question to \$2.00 per calendar week and to remove one sunset provision contained in the ordinance of June 14, 2002. A copy of the ordinance of March 24, 2003, is included as Joint Exhibit No. 29. (JSF-64)

D. OPTIONS AVAILABLE TO THE CITY OF CHARLESTON AS IT CONSIDERED A NEW "FEE" ORDINANCE IN 2003.

In August 2003, newspaper articles indicated that Danny Jones, the Mayor of the City of Charleston, wanted its City Council to enact an ordinance imposing a new municipal "fee", effective January 1, 2004, in the amount of \$1.00 per week, on individuals working within the corporate limits of the City of Charleston. (Joint Exhibit No. 34) It has been projected that the "fee" in question would generate between \$2,500,000 and \$3,000,000 per year for the City. (JSF-19) It was Mr. Cooper's understanding that proceeds from this "fee" were to be used to fund street maintenance and the hiring of additional police officers.

However, the City of Charleston could have generated the same amount of revenue, in a manner that was consistent with Clay County Citizens, by imposing a per-household fee similar to that imposed by the City of South Charleston. According to figures from the United States Census in 2000, the City of Charleston has a population of 53,421 and a total of 27,131 housing units; the City of South Charleston has a population of 13,390 and a total of 6,770 housing units; and the City of Huntington (located in Cabell and Wayne Counties) has a population of 51,475 and a total of

25,888 housing units. (JSF-17) To raise an extra \$2,500,000 per year on a pure flat-rate-per-month basis from the owners, or lessees, of its 27,131 housing units, the City Council of the City of Charleston (the "City Council") could have imposed a new fee at the rate of \$7.68 per housing unit per month. $27,131 \times 12 \times \$7.68 = \$2,500,393$.

Unfortunately, the Defendant decided to follow the City of Huntington's example.

E. EVENTS RELATING TO THE PASSAGE OF A NEW "FEE" ORDINANCE BY THE CITY OF CHARLESTON IN SEPTEMBER 2003.

On Monday, August 18, 2003, a bill, designated Bill No. 7002, to impose on individuals working in Charleston a "fee" similar to that imposed by the City of Huntington, was introduced by Edward Talkington, a member of the City Council, and was referred to the Finance Committee of that governing body. A copy of that bill, as introduced (hereinafter referred to in its introduced version as the "Talkington Bill"), is included as Joint Exhibit No. 9. (JSF-21)

Following the introduction of Bill No. 7002, the Charleston City Clerk's Office prepared a legal notice of a public hearing on that bill. Joint Exhibit No. 10 is a copy of the legal advertisement that was published in the Charleston Gazette on Thursday, September 4, 2003. (JSF-22) The first part of the first sentence in that notice read as follows:

Pursuant to Chapter 8, Section 13, Article 13, of the West Virginia Code notice is given that a Public Hearing will be held at a regular meeting of Council, on Tuesday, September 2, 2003 at 7:00 p.m., in the Council Chambers, City Hall, Charleston, West Virginia, on Bill No. 7002. . . [emphasis added]

The legal notice contained in Joint Exhibit No. 10 was published in Charleston newspapers on the following two (2) dates: Thursday, August 28, 2003, and Thursday, September 4, 2003. (JSF-23) Therefore, an individual who read the legal notice that

was published in the Charleston Gazette on Thursday, September 4, 2003, would probably have concluded that the hearing in question had already taken place on Tuesday, September 2, 2003.

Indeed, a regularly scheduled City Council meeting had been held on Tuesday, September 2, 2004. However, no individual signed up to speak at the meeting on the proposed "fee". (SJSF-2) Neither the Talkington Bill nor the proposed "fee" was discussed at that meeting. (Joint Exhibit No. 33)

Other than the legal notice published on August 28, 2003, and September 4, 2003, the Defendant did not cause to be published in any newspaper another legal notice pertaining to the "subject bill". (Defendant's Answer to Paragraph No. 38 of Mr. Cooper's Complaint.)

Another regularly scheduled City Council meeting was held on Monday, September 15, 2003. (JSF-24)

After speaking with a newspaper reporter and with several employees of the City of Charleston, Mr. Cooper was informed that he might be permitted to speak at a brief public hearing on the evening of September 15, 2003, immediately before the City Council was to take action on either the Talkington Bill or on a committee substitute for that bill. (JSF-26) Mr. Cooper was opposed to the Talkington Bill for a number of reasons. For example, he believed that it would impose an illegal and regressive municipal capitation tax of \$1.00 per head per week on most individuals who worked within the corporate limits of the City of Charleston.

Mr. Cooper, along with a few other individuals, was permitted to speak briefly against the Talkington Bill at the public hearing that was held on Monday evening,

September 15, 2003. In addition, Mr. Cooper submitted a three-page letter, dated September 15, 2003, in opposition to the Talkington Bill. A copy of that letter is included as Joint Exhibit No. 11. (JSF-27)

According to W. Va. Code § 8-11-4(a)(3), a "proposed ordinance shall not be materially amended at the same meeting at which finally adopted." Nevertheless, on September 15, 2003, the City Council made many changes to the Talkington Bill before passing an amended version of Bill No. 7002 at the same meeting.

Prior to the commencement of the meeting of City Council on Monday evening, September 15, 2003, the Finance Committee of that governing body met, during the afternoon of that day, and reported out to the City Council, with a recommendation that it do pass, a committee substitute for the Talkington Bill. A copy of that committee's report, along with the changes that it recommended to the Talkington Bill (Bill No. 7002) is included as Joint Exhibit No. 12. After making the changes, reflected in Joint Exhibit No. 12, to the Talkington Bill, the Finance Committee, during the afternoon of Monday, September 15, 2003, reported the committee substitute for the Talkington Bill to the full City Council. (JSF-28) A copy of the resulting "Committee Substitute for Bill No. 7002" is included as Joint Exhibit No. 13. (JSF-29)

At its meeting during the evening of Monday, September 15, 2003, at which Mr. Cooper spoke, the City Council amended the Talkington Bill by voting to substitute Committee Substitute for Bill No. 7002 in its place and by finally adopting that committee substitute at the same meeting. (JSF-30)

The Defendant never caused to be published in any newspaper a legal notice containing the text of Committee Substitute for Bill No. 7002. (JSF-25)

F. ROLE OF THE STATE AUDITOR'S OFFICE IN WITHHOLDING PAY FROM STATE EMPLOYEES AND IN REPORTING THEIR SOCIAL SECURITY NUMBERS TO TAXING AUTHORITIES.

In West Virginia, the State Auditor's Office actually performs the withholding and paycheck-drafting (or direct bank depositing of pay) work for state agencies. The Auditor's Office also remits to the Internal Revenue Service and the State Tax Commissioner the respective funds that have been withheld from employee paychecks (or direct-deposit pay) for federal and state income tax. (JSF-31) Once each year, the State Auditor's Office also prepares Forms W-2 and W-3 with respect to each state employee and submits those forms to the Social Security Administration. A copy of a blank Form W-2 is included as Joint Exhibit No. 14. A copy of a blank Form W-3 is included as Joint Exhibit No. 15. Each Form W-2 contains the Social Security number of the applicable state employee. State employees are required to attach copies of the applicable Form W-2 to their federal and state income tax returns. (JSF-32)

For employers that are not state agencies, a similar procedure is followed; however, the employer itself (and not the State Auditor) is responsible for the withholding, the paycheck-drafting, the remitting of the funds, and the submitting of forms. (JSF-33)

G. EVENTS BETWEEN THE PASSAGE OF THE ORDINANCE AND THE FILING OF THE CIVIL ACTIONS BELOW.

Following the passage of Committee Substitute for Bill No. 7002, Mr. Cooper concluded that provisions of the newly adopted ordinance purported to require the State Auditor's Office (a) to withhold the "fee" from Mr. Cooper's pay and to remit that withheld amount to the Defendant and (b) to release Mr. Cooper's Social Security number to the Defendant. Because he believed these provisions to be unlawful, Mr. Cooper

repeatedly requested that Mr. Gainer's office neither withhold the "fee" nor release Social Security numbers of state employees to the City.

On or about December 10, 2003, Mr. Cooper received a letter, dated December 8, 2003, from Mr. Gainer in response to letters from Mr. Cooper that were dated September 22, 2003, and November 29, 2003. In his reply letter, Mr. Gainer stated, "In response to your concerns, please be advised that the Auditor's Office has no intention of releasing social security numbers; however, we do intend to comply with the remittance provisions of the law". A copy of that letter is included as Joint Exhibit No. 18. (JSF-36)

During late autumn of 2003, the municipal code of the City of Charleston was in the process of being recodified. The effective date of the recodification was to be on or about November 21, 2003. (JSF-37) As a result of the recodification, the "City Service Fee" ordinance was moved from Chapter 6 to Chapter 2 of the Charleston City Code. A copy of the recodified ordinance is included as Joint Exhibit No. 19. (JSF-38) That ordinance, as so recodified, shall sometimes be referred to as the "2003 ordinance".

On or about December 1, 2003, Mr. Cooper obtained copies of regulations and forms that had been issued to implement the ordinance of September 15, 2003. A copy of the regulations promulgated by the Charleston City Collector's Office to implement that ordinance is included as Joint Exhibit No. 16. (JSF-34) Copies of the five (5) related forms – Form CSF-1 (Prior Payment Form), Form CSF-2 (Employer Remittance Form), Form CSF-3 (Self-Employed Remittance Form), Form CSF-4 (Employer Worksheet), and Form CSF-5 (Refund Claim Form) – are collectively included as Joint Exhibit No. 17. (JSF-35).

On January 14, 2004, Mr. Cooper delivered to the office of Charleston City Collector Kenneth Guthrie a letter, bearing that date, requesting that Mr. Guthrie's office "neither attempt to obtain the Social Security number of any state employee nor attempt to divert to the City any money from the pay of any state employee, unless the employee first gives you written and signed permission to do so." In that letter, Mr. Cooper also stated that he would "attempt to require the City to refund to me any money that it may, in the short run, succeed in diverting from my pay, whether or not the City chooses to maintain records as to the diversion of money from my pay to the City." A copy of that letter is included as Joint Exhibit No. 20. (JSF-39)

Notwithstanding Mr. Cooper's requests to Mr. Gainer and to Mr. Guthrie, the Auditor's Office began, in January 2004, to withhold the "fee" from the direct deposit of Mr. Cooper's net pay into his bank. Mr. Cooper is paid twice per month. The sum of \$2.16 was withheld from his pay on each of the following pay dates: January 16, 2004, and January 30, 2004, as well as twice per month thereafter. The pay stub from the Auditor's Office for each of those pay periods has described the withholding for the Charleston "user fee" as follows: "CITY CHAS—USERF \$2.16" (JSF-40)

H. FILING OF THE CIVIL ACTIONS BELOW AND SUBSEQUENT PROCEDURAL HISTORY.

On January 20, 2004, Mr. Gainer filed a complaint for declaratory relief against the City in the Circuit Court of Kanawha County. That case was assigned Civil Action No. 04-C-122. On February 23, 2004, Mr. Cooper also filed a complaint for declaratory and injunctive relief against the City in the Circuit Court of Kanawha County. That case was assigned Civil Action No. 04-C-408. In his complaint, Mr. Cooper set forth seventeen (17) separate causes of action. The two cases were eventually assigned to

the Honorable Judge James C. Stucky, who granted Mr. Cooper's motion to consolidate them. After extensive negotiations, the parties filed written stipulations and dozens of joint exhibits that resolved all material issues of fact in these cases in anticipation of oral argument on June 9, 2004, before Judge Stucky.

During the pendency of the proceedings, the Circuit Court, on May 18, 2004, entered an agreed order that required the Clerk of the Circuit Court to hold "fee" payments with respect to state employees in an interest-bearing escrow account pending the Court's resolution of issues raised by Mr. Gainer.

However, also on May 18, 2004, in a last-minute effort to avoid certain arguments raised by Mr. Cooper with respect to the procedure and notice under which the City Council had adopted Committee Substitute for Bill No. 7002 on September 15, 2003, a member of the City Council introduced Bill No. 7070. Bill No. 7070 was virtually identical to the recodified version of Committee Substitute for Bill No. 7002, except that Bill No. 7070 acted retroactively to January 1, 2004, while Committee Substitute for Bill No. 7002, as recodified, had only operated prospectively. Although it provided preadoption notice to the public of proposed Bill No. 7070, the Defendant did not provide postadoption notice to the public of Bill No. 7070.

On Monday evening, June 7, 2004, the City Council adopted Bill No. 7070. That ordinance shall sometimes be referred to as the "2004 ordinance". A copy of the 2004 ordinance was later presented to the Circuit Court.

On Wednesday morning, June 9, 2004, the parties offered oral argument on the issues in these cases, including arguments relating to a motion for partial summary

judgment recently filed by the City with respect to the issues purportedly "mooted" by the passage of Bill No. 7070, just two (2) days before that oral argument.

On June 28, 2004, the Circuit Court entered its "Final Order" in these cases. In that order of June 28, 2004, the Circuit Court explicitly or implicitly ruled against the Plaintiffs on all issues that they had raised with respect to the fee ordinance(s) in question, with one exception: The Circuit Court did agree with the Plaintiffs that making the State of West Virginia liable for the debts of its employees was unconstitutional.

Shortly after the order of June 28, 2004, was entered, the City filed a motion that the Court order the release, to the City, of the "fee" payments from state employees which had been deposited in the interest-bearing account that had been established in accordance with the order of May 18, 2004. On July 6, 2004, at the end of a hearing on the latter motion, the Court, again rejecting the Plaintiffs' arguments, entered its "Escrow Disposition Order" that directed the Circuit Clerk of Kanawha County to release the funds in question.

On July 8, 2004, Mr. Cooper filed with the Circuit Court a motion to stay, without bond, the orders of June 28, 2004, and July 6, 2004, and for the deposit of the "fee" proceeds into an escrow account pending his filing of a petition for appeal with this Honorable Court. On July 15, 2004, the Circuit Court issued an order denying Mr. Cooper's motion of July 8, 2004.

On Friday, August 13, 2004, Mr. Cooper filed with this Honorable Court a similar motion for stay and for deposit of the "fee" proceeds into an escrow account pending his filing of a petition for appeal. On August 13, 2004, this Honorable Court issued an order that denied (3-2) that motion.

On April 7, 2005, this Honorable Court granted (4-1) Mr. Cooper's petition for appeal of the Circuit Court's order of June 28, 2004.

III. ASSIGNMENTS OF ERROR.

The assignments of error relied upon in this appeal are as follows:

(1) The Circuit Court erred by failing to hold that Committee Substitute for Bill No. 7002 is null and void because (a) the City failed to provide proper preadoption notice of the proposed ordinance, (b) the City Council materially amended the original bill at the same meeting at which the committee substitute was finally adopted, and (c) the City failed to provide proper postadoption notice of the ordinance that was passed.

(2) The Circuit Court erred by holding that the failure of the City to provide postadoption notice of Bill No. 7070, as passed, did not prevent that ordinance from taking effect.

(3) The Circuit Court erred by failing to hold that the provisions of Bill No. 7070 are invalid insofar as they purport to be retroactive.

(4) The Circuit Court erred by failing to hold that the 2003 and 2004 ordinances are null and void insofar as they impose a "fee" upon individuals who neither reside within, nor own or lease real estate within, the corporate limits of the City of Charleston.

(5) The Circuit Court erred by failing to hold that the 2003 and 2004 ordinances are null and void because the "fee" and other responsibilities that they impose are clearly inequitable, unreasonable, and imprudent.

(6) The Circuit Court erred by holding that the 2003 and 2004 ordinances do not impose a prohibited tax.

(7) The Circuit Court erred by failing to hold that the 2003 and 2004 ordinances are null and void insofar as they dedicate "fee" revenues for public improvements.

(8) The Circuit Court erred by holding that the 2003 and 2004 ordinances do not deny access to the courts.

(9) The Circuit Court erred by holding that the provisions of the 2003 and 2004 ordinances that require employers to withhold the "fee" from the pay of each employee are reasonable and valid.

(10) The Circuit Court erred by failing to hold that the provisions of the 2003 and 2004 ordinances, and of regulations and forms issued pursuant thereto, that authorize or require the disclosure or release of Social Security numbers to employees or agents of the City are null and void because these provisions violate state and federal law.

(11) The Circuit Court erred by failing to hold that the provisions of the 2003 and 2004 ordinances, and of regulations and forms issued pursuant thereto, that require state agencies, as employers, to do anything with respect to their employees, are null and void because these provisions violate state law.

(12) The Circuit Court erred by failing to hold that the provisions of the 2003 and 2004 ordinances, and of regulations issued pursuant thereto, that generally make employers liable for the payment of "fees" upon their employees, are null and void because these provisions violate state law.

(13) The Circuit Court erred by holding that the 2003 and 2004 ordinances do not violate constitutional provisions relating to uniform taxation, equal protection, and due process.

**IV. POINTS AND AUTHORITIES RELIED
UPON AND DISCUSSION OF THE LAW.**

- A. THE CIRCUIT COURT ERRED BY FAILING TO HOLD THAT COMMITTEE SUBSTITUTE FOR BILL NO. 7002 IS NULL AND VOID BECAUSE (a) THE CITY FAILED TO PROVIDE PROPER PREADoption NOTICE OF THE PROPOSED ORDINANCE, (b) THE CITY COUNCIL MATERIALLY AMENDED THE ORIGINAL BILL AT THE SAME MEETING AT WHICH THE COMMITTEE SUBSTITUTE WAS FINALLY ADOPTED, AND (c) THE CITY FAILED TO PROVIDE PROPER POSTADoption NOTICE OF THE ORDINANCE THAT WAS PASSED.**
-

In his first, second, and third causes of action, Mr. Cooper alleged that Committee Substitute for Bill No. 7002 was null and void because the City had failed to provide proper preadoption notice of the proposed ordinance, because the proposed ordinance had been materially amended at the same meeting at which it had been adopted, and because the City had failed to provide postadoption notice of the passed ordinance for the purposes of allowing voters to obtain signatures for a possible referendum.

1. FAILURE TO PROVIDE PREADoption NOTICE.

W. Va. Code § 8-11-4(a)(2) establishes the following preadoption notice requirements (among others) for proposed ordinances that would increase municipal fees or taxes:

At least five days before the meeting at which a proposed ordinance, the principal object of which is the raising of revenue for the municipality, is to be finally adopted, the governing body shall cause notice of the proposed adoption of said proposed ordinance to be published. . . The notice shall state the . . . date, time and place of the proposed final vote on adoption. . . [emphasis added]

Notwithstanding these requirements, the notices that were published in the newspapers did not correctly state the date, September 15, 2003, on which the final vote on adopting Bill No. 7002, or (to be more precise) on which the final vote on

adopting Committee Substitute for Bill No. 7002, actually took place. To the contrary, the legal advertisements that were published on August 28, 2003, and September 4, 2003, indicated that the vote on Bill No. 7002 would take place (or already had taken place) on September 2, 2003. (JSF-22, JSF-23, Joint Exhibit No. 10)

2. MATERIAL AMENDMENT OF ORDINANCE DURING MEETING AT WHICH IT WAS ADOPTED.

Under W. Va. Code § 8-11-4(a)(3), a "proposed ordinance shall not be materially amended at the same meeting at which finally adopted". Nevertheless, Bill No. 7002 was materially amended at the same meeting on September 15, 2003, at which Committee Substitute for Bill No. 7002 was finally adopted. Strikethroughs of the original language and underscoring, reflecting new language, are set forth on lines 1, 72, 74, 75, 76, 77, 79, 80, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 108, 109, 110, 111, 112, 113, 114, 115, 117, 118, 119, 120, 122, 123, 124, 129, 130, 131, 140, 141, 155, 156, 157, 177, 196, 197, 199, 209, 211, 212, 213, 214, 215, 217, 218, 219, 220, 221, 223, 224, 226, 233, 235, 242, 257, 258, 274, 275, 276, 277, 278, 280, 289, 290, 292, 293, 294, 295, 296, 297, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 316, 317, 318, 319, 320, 322, 325, and 329 of the marked-up version. (Joint Exhibit No. 12)

3. FAILURE TO PROVIDE POSTADOPTION NOTICE.

Under W. Va. Code § 8-13-13 (1971), the statutory section under the color of which the City Council passed Committee Substitute for Bill No. 7002 on September 15, 2003, the "qualified" (registered) voters of a municipality have the power of referendum to nullify an ordinance passed under the provisions of that section. First, however, the

municipality must provide postadoption notice by a Class II legal advertisement of the enacted ordinance during two (2) successive weeks:

. . . Notwithstanding the provisions of section four, article eleven of this chapter, any ordinance enacted or substantially amended under the provisions of this section shall be published as a Class II legal advertisement in compliance with the provisions of article three, chapter fifty-nine of this code, and the publication area for such publication shall be the municipality. . . [emphasis added]

After that postadoption notice has been completed, W. Va. Code § 8-13-13 (1971) provides registered voters with an additional fifteen (15) days to complete the filing of protest petitions with the municipal clerk or recorder:

. . . In the event thirty percent of the qualified voters of the municipality by petition duly signed by them in their own handwriting and filed with the recorder of the municipality within fifteen days after the expiration of such publication protest against such ordinance as enacted or amended, the ordinance shall not become effective until it shall be ratified by a majority of the legal votes cast thereon by the qualified voters of such municipality at a regular municipal election or special municipal election, as the governing body shall direct. Voting thereon shall not take place until after notice of such submission shall have been given by publication as above provided for the publication of the ordinance after it is adopted or substantially amended. . . [emphasis added]

For over sixty (60) years, this Honorable Court has recognized the importance of the importance of the referendum provision in W. Va. Code § 8-13-13 (1971) and its statutory predecessors. Under an earlier version of the statute, a referendum could be triggered by timely signatures of ten percent of a municipality's qualified voters. This Court has long understood that the referendum language is consistent with the concept that the "users" upon whom involuntary fees may be imposed by this statutory section are the residents of the municipality that imposes those fees and the owners or lessees of real estate located within that municipality. For example, in McCoy v. Sistersville, 120 W. Va. 471, 476, 199 S.E. 260 (1938), this Court stated:

Bearing upon what we may reasonably conclude the legislature had in mind

in enacting this law, and the persons sought to be affected thereby, attention is called to the fact that an ordinance of this character is required to be published once a week for two successive weeks in two local newspapers, and it ten per cent of the registered voters, by written petition, protest against the same, it shall not be effective until it has been ratified by a majority of the votes cast by the duly qualified voters of such municipality at an election duly and regularly held as provided by the laws and ordinances thereof. This provision, it seems to us, necessarily implies that the charges imposed must, in theory at least, apply to all users of the services provided for, living within the municipality.
[emphasis added]

Nearly half a century later, the notice requirements imposed by W. Va. Code § 8-13-13 were discussed in Miller v. Palmer, 175 W. Va. 565, 336 S.E.2d 213 (1985). In that case, this Court spoke favorably of the City of Wheeling's postadoption publication of notices relating to a fire-service fee. The fire-service-fee ordinance was adopted on by the city council of that municipality on August 30, 1983. The postadoption notices were published on September 2 and 9, 1983. Id. A copy of the notice published on September 9, 1983, is included as Joint Exhibit No. 32. (SJSF-1)

Because (1) the Defendant failed to provide proper preadoption notice that complied with W. Va. Code § 8-11-4(a)(2), before passing Committee Substitute for Bill No. 7002 on September 15, 2003, (2) the Defendant materially amended Bill No. 7002 on September 15, 2003, by inserting in lieu thereof Committee Substitute for Bill No. 7002, at the same meeting at which Committee Substitute for Bill No. 7002 was finally adopted, in violation of W. Va. Code § 8-11-4(a)(3), and (3) the Defendant failed to provide any postadoption notice whatsoever with respect to Committee Substitute for Bill No. 7002 after it was adopted on September 15, 2003, in violation of W. Va. Code § 8-13-13 (1971), the Circuit Court should have declared Committee Substitute for Bill No. 7002, as subsequently recodified in late 2003, to be null and void in its entirety.

Instead of ruling in Mr. Cooper's favor as to his first, second, and third causes of action, the Circuit Court, on page 6 of its order, stated that the issues presented in those causes of action "were rendered moot by the re-publication and re-enactment of the City of Charleston's User Fee Ordinance." The Circuit Court was referring to the preadoption notice as to, and the adoption of, Bill No. 7070 in 2004. In support of its ruling, the Circuit Court cited Syllabus Point 1 of Velogol v. City of Weirton, 212 W. Va. 687, 575 S.E.2d 297 (2002) (per curiam). That syllabus point stated that courts will not ordinarily decide a moot question.

To the extent that it has any precedential value, Velogol is inapplicable to this case. For example, that case involved the validity of fees that were similar to those approved earlier by this Court. Id. The "fee" imposed by the Defendant is not similar to any fee that has been approved by this Court. The procedural issues raised in Mr. Cooper's first three causes of action have broad application and should be addressed by this Court. What the Defendant has done is certainly capable of repetition. Cf. Syl. pts. 2 and 3, State ex rel. McKenzie v. Smith, 212 W. Va. 288, 569 S.E.2d 809 (2002).

B. THE CIRCUIT COURT ERRED BY HOLDING THAT THE FAILURE OF THE CITY TO PROVIDE POSTADOPTION NOTICE OF BILL NO. 7070, AS PASSED, DID NOT PREVENT THAT ORDINANCE FROM TAKING EFFECT.

The information submitted by Counsel for the Defendant to Mr. Cooper and to the Circuit Court with respect to Bill No. 7070 indicated that the Defendant had not provided, and did not intend to provide, postadoption notice to the public of its passage. Hereinabove, Mr. Cooper has already discussed the provisions of W. Va. Code § 8-13-13 (1971), that require the City to provide such postadoption notice.

Because the Defendant provided no postadoption notice with respect to Bill No. 7070 after it was adopted on June 7, 2004, the Circuit Court should have held that its provisions have not taken effect, either retroactively or prospectively. See generally W. Va. Code §§ 8-11-4(a) and 8-13-13 (1971); State ex rel. Plymale v. City of Huntington, 147 W. Va. 728, 131 S.E.2d 160 (1963); State ex rel. Riffle v. City of Clarksburg, 152 W. Va. 317, 162 S.E.2d 181 (1968); Miller v. Palmer, *supra*; Willard Lorensen, "Rethinking the West Virginia Municipal Code of 1969," 97 W. Va. L. Rev. 653, 668-677, and 673, n. 67 (1995).

However, the Circuit Court, in a footnote on page 4 of its order of June 28, 2004, stated that it rejected Mr. Cooper's "contention that West Virginia Code § 8-13-13 requires post-passage notice." In so holding, the Circuit Court relied upon Syllabus Point 1 of Nine v. Grant Town, 190 W. Va. 86, 437 S.E.2d 250 (1993). In that syllabus point, this Court made this statement:

Because W. Va. Code, 8-13-13 (1971), is silent as to when publication should be made with respect to the adoption of an ordinance, the general rule is that publication should be done in advance of the passage of the ordinance. [emphasis added]

While Mr. Cooper agrees that the general rule is that publication should be done in advance of the publication of an ordinance, the fact that preadoption notice is required does not mean that postadoption notice is not required. W. Va. Code § 8-11-4(a)(2) clearly requires preadoption notice with respect to every "proposed ordinance, the principal object of which is the raising of revenue for the municipality" (including ordinances that relate to proposed fees under W. Va. Code § 8-13-13 (1971)). A careful reading of W. Va. Code § 8-13-13 (1971) demonstrates that it is not at all "silent" about

the timing of the notice that it mandates. Its provisions require postadoption notice, which should be at least as specific as that contained in Joint Exhibit No. 32.

The Circuit Court's interpretation of Nine v. Grant Town is completely inconsistent with Miller. Indeed, Miller was not cited, discussed, limited, or overruled in Nine v. Grant Town, which did not even involve a fee imposed under W. Va. Code §8-13-13 (1971). On the other hand, Nine v. Grant Town correctly held that a municipality's tax on public utilities was imposed pursuant to W. Va. Code § 8-13-5a, but not pursuant to W. Va. Code § 8-13-13 (1971), and also correctly stated that W. Va. Code § 8-13-13 (1971) relates to taxes (or fees) raised by a municipality that furnishes services to its citizens.

Mr. Cooper requests that this Honorable Court not only reverse the Circuit Court's ruling as to postadoption notice but also overrule all portions of Nine v. Grant Town that are inconsistent with the other authorities cited above.

C. THE CIRCUIT COURT ERRED BY FAILING TO HOLD THAT THE PROVISIONS OF BILL NO. 7070 ARE INVALID INSOFAR AS THEY PURPORT TO BE RETROACTIVE.

Mr. Cooper submits that the Circuit Court also erred by failing to hold that the provisions of Bill No. 7070 are invalid insofar as they purport to be retroactive.

Mr. Cooper acknowledges that this Court indicated, in Footnote 3 of its per curiam decision in Velogol v. City of Weirton, supra, that retroactivity may be appropriate in some municipal ordinances.

Nevertheless, Mr. Cooper is of the opinion that the postadoption notice required by W. Va. Code § 8-13-13 (1971) and the opportunity therein for qualified voters of a municipality to keep a fee ordinance from going into effect, if enough of them file their petitions with the municipal recorder within fifteen (15) days after the second publication

of that postadoption notice, until a referendum is held, are inconsistent with the premise that an ordinance adopted pursuant to that statutory section could ever be retroactive.

Accordingly, Mr. Cooper requests that this Honorable Court hold that fee ordinances, including Bill No. 7070, that are adopted pursuant to W. Va. Code § 8-13-13 (1971), are never retroactive and do not take effect until after the expiration of the aforementioned period for filing protest petitions.

D. THE CIRCUIT COURT ERRED BY FAILING TO HOLD THAT THE 2003 AND 2004 ORDINANCES ARE NULL AND VOID INsofar AS THEY IMPOSE A "FEE" UPON INDIVIDUALS WHO NEITHER RESIDE WITHIN, NOR OWN OR LEASE REAL ESTATE WITHIN, THE CORPORATE LIMITS OF THE CITY OF CHARLESTON.

In his fourth cause of action, Mr. Cooper alleged that the 2003 ordinance is void insofar as it imposes a "fee" on individuals who neither reside within, nor own or lease real estate within, the corporate limits of the City of Charleston. As in each of the remaining causes of action, the allegations and arguments he made in the fourth cause of action with respect to the 2003 ordinance apply to the 2004 ordinance as well.

Mr. Cooper's legal position is based upon his understanding of W. Va. Code § 8-13-13 (1971) and cases construing it. Applicable provisions of the first part of that statutory section read as follows:

Notwithstanding any charter provisions to the contrary, every municipality which furnishes any essential or special municipal service, including, but not limited to, police and fire protection, . . . street maintenance and improvement, . . . and the collection and disposal of garbage, refuse, waste, ashes, trash and any other similar matter, shall have plenary power and authority to provide by ordinance for the installation, continuance, maintenance or improvement of such service, to make reasonable regulations with respect thereto, and to impose by ordinance upon the users of such service reasonable rates, fees and charges to be collected in the manner specified in the ordinance. . . [emphasis added]

In construing W. Va. Code § 8-13-13 (1971), this Honorable Court has never authorized the imposition of an involuntary "fee" upon individuals who neither reside within, nor own or lease real estate within, the corporate limits of the municipality that imposed that "fee". Indeed, in Nine v. Grant Town, 437 S.E.2d at 253, this Court stated:

The legislature's language under W. Va. Code, 8-13-13, is based on the premise that a municipality incurs some expense for furnishing, installing, continuing maintenance, or improving a service that it renders to its citizens. . . The taxes authorized by W. Va. Code, 8-13-13, are not limited to a specific statutory amount and are borne directly by the citizens of that municipality. . .[emphasis added]

Furthermore, this Honorable Court, has, in eight (8) decisions spread over nearly seven (7) decades, repeatedly upheld the imposition, under the authority of W. Va. Code § 8-13-13 (1971) and its statutory predecessors, by a municipality, of involuntary "fees" upon individuals and other legal entities that reside within, or own or lease real estate within, the corporate limits of that municipality, as "users" of the services provided by that municipality: (1) McCoy v. Sistersville, *supra* (1938) (approving the imposition, by the City of Sistersville, of a fire-protection fee upon J. Hansford McCoy, a resident of, and property owner in, that city); (2) City of Moundsville v. Steele, 152 W. Va. 465, 164 S.E.2d 430 (1968) (approving the imposition, by the City of Moundsville, of a charge of twenty-five cents per front foot for street improvement and maintenance upon Carr Steele, a resident of, and occupant of improved property abutting a street in, that city); (3) City of Charleston v. Board of Education, 158 W. Va. 141, 209 S.E.2d 55 (1974) (approving the imposition, by the City of Charleston, of a fire-protection fee upon the Kanawha County school board, an owner of buildings in that city); (4) Ellison v. City of Parkersburg, 168 W. Va. 468, 284 S.E.2d 903 (1981) (approving the imposition, by the City of Parkersburg, of a fee for solid waste collection and disposal upon the owners

and occupants of residential units in that city); (5) City of Princeton v. Stamper, 195 W. Va. 685, 466 S.E.2d 536 (1995) (approving the imposition, by the City of Princeton, of a fee for solid waste collection and disposal upon Samantha Stamper, John B. Conley, and Garnet Conley, residents of, and owners or lessees of residential property in, that city, even though they chose not to use that city's services to remove the solid waste that they had generated); (6) City of Huntington v. Bacon, 196 W. Va. 457, 473 S.E.2d 743 (1996) (approving the imposition, by the City of Huntington, of a fee for fire and flood-protection services, upon the Cabell County school board, John Bacon, Carole Bacon, and others, owners of buildings in that city); (7) City of Clarksburg v. Grandeotto, Inc., 204 W. Va. 404, 513 S.E.2d 177 (1998) (per curiam) (approving the imposition, by the City of Clarksburg, of a fire-protection fee upon Grandeotto, Inc., Kathy A. Folio, and others, owners of land and buildings in that city; approving the imposition, by the City of Huntington, of a fee for fire and flood-protection services upon the Roman Catholic Diocese of Wheeling-Charleston, an owner of buildings in that city; and approving the imposition, by the City of Wheeling of a fire-protection fee upon the Diocese, the Ohio County school board, and Wheeling Jesuit University, owners of buildings in that city); and (8) Dean v. Town of Addison, 207 W. Va. 538, 534 S.E.2d 403 (2000) (approving the imposition by the Town of Webster Springs, or "Addison", of a fire-protection fee upon William R. Dean and others, owners or lessees of residential property in that town, even though the fire-protection services are actually rendered by a volunteer fire department).

The common thread that ties these eight (8) decisions together is that W. Va. Code § 8-13-13 (1971) authorizes a municipality to impose reasonable fees upon the

owners or lessees of houses, stores, places of worship, school buildings, and other buildings on improved real estate located within the corporate limits of that municipality, if those fees are not based upon the value of the buildings in question, (1) for services -- such as police, fire, and solid-waste-collection services -- that that municipality and its agents actually deliver, or make available, to those buildings, and to their owners or lessees, (2) for the maintenance of the streets upon which those buildings are located, and (3) for the prevention of floods that might damage or demolish those buildings. Consistent with these eight (8) decisions is that in Clay County Citizens, in which this Court in 1994 upheld an annual \$25.00-per-household fee for ambulance service provided in Clay County that was enacted under the authority of W. Va. Code § 7-15-17 (1975). The Circuit Court's order of June 28, 2004, runs counter to the logic underlying these nine (9) decisions.

Not surprisingly, appellate courts elsewhere have rejected per-head charges imposed by municipal ordinance upon nonresident workers. Two such decisions -- involving ordinances that bear several similarities to the City of Charleston's "fee" ordinance -- involved municipal ordinances adopted by the City of Johnstown and the Borough of Midland, each of which is located in Pennsylvania. At the time of those rulings, both Pennsylvania and West Virginia authorized municipal capitation taxes of no more than a few dollars per head per year.

In Danyluk v. Bethlehem Steel Company, 406 Pa. 427, 178 A.2d 609 (1962), the Supreme Court of Pennsylvania affirmed a decision striking down a \$10.00-per-year municipal "occupational tax". The tax in question was not a true occupation tax on businesses and professions. This municipal tax was imposed upon every nonresident

who engaged "in any occupation whatsoever within the corporate limits of the City of Johnstown." Id. This ordinance required employers to withhold the tax from nonresident employees. Id. Nonresident employees of Bethlehem Steel Company who worked in that municipality sued their employer and the City of Johnstown "to enjoin the former from paying over to the latter any amounts withheld from their wages as a result of the ordinance and to enjoin City from collecting said sums." Id., 178 A.2d at 610. The lower court issued a permanent injunction against the municipality and the employer and ordered Bethlehem Steel Corporation to return the money that was withheld. Id.

In affirming the lower-court decision on a number of grounds, the Supreme Court of Pennsylvania made the following comments:

The tax bears none of the incidents of an occupation tax which is a flat rate levy measured by the assessed value of a man's occupation. Consequently, in a true occupation tax the amount of the levy varies with the assessed value of a particular mode of employment. Here, no distinctions among occupations are made, a fixed ten dollar levy falling upon all non-residents. The use of the word "occupational" adds nothing to the levy and does not conceal its real nature as a capitation tax.

"Capitation or poll taxes are taxes of a fixed amount upon all the persons of a certain class, within the jurisdiction of the taxing power, without regard to the amount of their property or the occupations or business in which they may be engaged." [citations omitted] The tax is imposed because of the protection which a governmental unit affords to persons residing therein, and is designed primarily to require contribution from all residents for the services rendered them by the taxing authority. Consequently, per capita, capitation or head taxes can be imposed only upon the residents of the particular political subdivision since residence alone furnishes the contact necessary to render a person amenable to the direct levy. [emphasis added] [Id.]

In Guernsey v. Borough of Midland, 197 Pa. Super. 394, 178 A.2d 782 (1962), the Superior Court of Pennsylvania enjoined the enforcement, as to nonresident workers, of a municipal ordinance adopted by the Borough of Midland that had imposed another "occupational tax" of \$10.00 per year on every individual engaged in any

occupation of any kind within the corporate limits of that borough. In its opinion, the Superior Court stated:

It appears that of the approximately 7000 persons employed within the corporate limits of the Borough of Midland approximately 80% reside outside the borough. The plaintiffs in this case, being among those who work in the borough but reside outside of it, brought an action in equity to enjoin the borough from collecting the above tax. The court below concluded that the tax was legally imposed and dismissed the appeal. The plaintiffs appealed. [Id.]

Citing Danyluk, the Superior Court of Pennsylvania ruled that what was imposed was actually a capitation tax. Id., 178 A.2d at 783. The Superior Court also ruled that a municipal corporation was not authorized to impose capitation taxes upon nonresidents. Therefore, the Superior Court held that the nonresident plaintiffs were entitled to an injunction that restrained the Borough of Midland from collecting the tax from them. Id.

In Syllabus Point 7 of Calabrese v. City of Charleston, 204 W. Va. 651, 515 S.E.2d 814 (1999), this Honorable Court stated:

A municipal corporation has only the powers granted to it by the legislature, and any power it possesses must be expressly granted or necessarily or fairly implied or essential and indispensable. If any reasonable doubt exists as to whether a municipal corporation has a power, the power must be denied.

Accordingly, Mr. Cooper respectfully requests that this Court reverse the Circuit Court as to his fourth cause of action and hold that the ordinances in question are null and void insofar as they impose a "fee" upon individuals who neither reside within, nor own or lease real estate within, the corporate limits of the City of Charleston.

E. THE CIRCUIT COURT ERRED BY FAILING TO HOLD THAT THE 2003 AND 2004 ORDINANCES ARE NULL AND VOID BECAUSE THE "FEE" AND OTHER RESPONSIBILITIES THAT THEY IMPOSE ARE CLEARLY INEQUITABLE, UNREASONABLE, AND IMPRUDENT.

In his fifth cause of action, Mr. Cooper alleged that the 2003 ordinance is void because the "fee" that it imposes is inequitable, unreasonable, and imprudent.

Under W. Va. Code § 8-13-13 (1971), municipalities are authorized to impose, by ordinance, upon the users of municipal services, reasonable rates, fees, and charges. However, the 2003 and 2004 ordinances do not comply with that requirement.

For example, under these ordinances, the members of a family of two (2) parents working full time at the minimum wage and two (2) teenagers working part time at the minimum wage are required to pay a total of \$4.00 per week (\$208.00 per year) if all of them report to work within the corporate limits of the City of Charleston, even if those individuals reside outside its corporate limits.

On the other hand, the ordinances in question impose no "fee" at all upon a millionaire, residing within the corporate limits of the City of Charleston, whose income is derived wholly from dividends, royalties, interest, and capital gains, and no "fee" at all upon a wealthy physician, dentist, engineer, or lawyer, residing within the corporate limits of the City of Charleston, whose only office or place of business is located within the corporate limits of the City of South Charleston.

Furthermore, the Charleston Police Department does not track the percentage of direct police intervention concerning people who are employed in the City of Charleston. (JSF-65) Nor does the City track which streets are regularly traveled by each individual who works in the City of Charleston. (JSF-68) Accordingly, there is no rational statistical basis in the "fee" ordinances for requiring individuals who work in Charleston to pay the Defendant about \$2,500,000 per year while requiring everyone else who uses city streets to pay \$0 per year.

The ordinances also impose unreasonably burdensome withholding, remittance, and paperwork requirements upon arguably every employer of a babysitter or of any

other other part-time or full-time employee who reports to work within the corporate limits of the City of Charleston. (See the provisions of Joint Exhibits Nos. 16 and 17.)

Because the "fee" and other responsibilities imposed by the 2003 and 2004 ordinances are clearly inequitable, unreasonable, and imprudent, Mr. Cooper respectfully requests that this Honorable Court reverse the Circuit Court as to his fifth cause of action, hold that these ordinances violate the provisions of W. Va. Code § 8-13-13 (1971), and declare these ordinances null and void.

F. THE CIRCUIT COURT ERRED BY HOLDING THAT THE 2003 AND 2004 ORDINANCES DO NOT IMPOSE A PROHIBITED TAX.

In his sixth, seventh, eighth, and ninth causes of action, Mr. Cooper alleged that the 2003 ordinance is void because it imposes an unlawful municipal capitation tax, because it imposes an unconstitutional municipal capitation tax, and because it imposes an unlawful municipal income tax, and that the ordinance is void insofar as it violates the statutory cap on the municipal business and occupation (B & O) tax, respectively.

Because they impose a "fee" of \$1.00 per head per week on the overwhelming majority of individuals who work in, or report to work in, the City of Charleston, the 2003 and 2004 ordinances impose an unlawful and unconstitutional municipal capitation tax.

Prior to 1971, a state capitation tax was imposed by Article X, § 2, of the West Virginia Constitution, which read as follows:

Capitation Tax

2. The Legislature shall levy an annual capitation tax on one dollar upon each male inhabitant of the State who has attained the age of twenty-one years, which shall be annually appropriated to the support of free schools. Persons affected by bodily infirmity may be exempted from this tax. [emphasis added] [JSF-43]

Between 1933 and 1971, a state capitation tax was imposed by W. Va. Code § 11-7-1. A copy of Chapter 59 of the Acts of the Second Extraordinary Session of the 1933 Legislature, which imposed such a state capitation tax, is included as Joint Exhibit No. 22. (JSF-44)

Furthermore, between 1937 and 1971, a municipal capitation tax was imposed by § 8-13-3 of the West Virginia Code and its statutory predecessor. A copy of W. Va. Code § 8-13-3 (1969), as it existed between 1969 and 1971, is included as Joint Exhibit No. 23. (JSF-45)

In 1970, state legislators decided to abolish all capitation taxes (also known as "head taxes" and "poll taxes") in West Virginia. In making this decision, the members of our Legislature followed the example of many other states that had put an end to this regressive tax.

For example, Oregon's voters had abolished capitation taxes in that state sixty (60) years earlier. In City of Portland v. Cook, 170 Or. App. 245, 250, 251, 12 P.3d 70, 74 (2000), review denied, 332 Or. 56, 26 P.3d 150 (2001), the Court of Appeals of Oregon, explained why that state's voters had long ago abolished capitation taxes:

. . . A poll or head tax is a fixed tax on each eligible person. . . Article IX, section 1a, which prohibits these taxes, was added to the constitution in 1910. The amendment's supporters explained that a poll or head tax "is unjust not only because it is collected from very few of the men who are supposed to pay, but also because it bears so unequally on men in proportion to their ability to pay." Voters' Pamphlet, General Election, November 8, 1910, at 24-25. [footnote omitted] The problem that the measure's supporters perceived was that poll or head taxes are not graduated. As they explained, "[t]he laborer supporting a family on \$2 a day pays exactly the same poll tax as the corporation manager with a salary of ten thousand dollars a year." Id.

During the 1970 Regular Session, the West Virginia Legislature adopted House Joint Resolution No. 6, which among other things, related to the repeal of Article X, § 2, of the West Virginia Constitution, through an amendment thereto. During that session, the West Virginia Legislature also passed a bill proposing a constitutional amendment, designated the "Capitation Tax Repeal Amendment", and directed that notice thereof be published and that the proposed constitutional amendment be submitted to the voters during the 1970 general election. Copies of that resolution and that bill are collectively included in Joint Exhibit No. 24. (JSF-46) On November 3, 1970, the voters of West Virginia, by a vote of 253,638 to 117,660, overwhelmingly ratified a constitutional amendment that repealed Article X, § 2, of the West Virginia Constitution. (JSF-48)

During the 1971 Regular Session, the West Virginia Legislature passed a bill that repealed W. Va. Code § 8-13-3 (1969) and that also repealed the state capitation tax. A copy of that bill, contained in Chapter 168 of the 1971 Acts of the 1971 Regular Session of the West Virginia Legislature, is included as Joint Exhibit No. 26. (JSF-49)

Before being repealed in 1971, W. Va. Code § 8-13-3 (1969), read as follows:

Every municipality shall have plenary power and authority to levy and collect an annual capitation tax upon inhabitants of the municipality who have attained the age of twenty-one years. The governing body may exempt from such tax all individuals who are dependent in whole or in part upon public assistance for their support. The rate of such tax shall not exceed two dollars per individual and the revenue so produced shall be applied primarily to the maintenance and repair of streets, avenues, roads, alleys, ways and other public places. [emphasis added] [Joint Exhibit No. 23]

There are a number of similarities between municipal capitation taxes authorized by that repealed statutory section and the following provisions of the Defendant's 2003 and 2004 ordinances:

ARTICLE VIII [sic]. CITY SERVICE FEE

Sec. 2-737. Imposition of fee; rate.

There is hereby imposed a city service fee upon each employee and self-employed individual at the rate of \$1.00 per calendar week of employment within the city. No individual shall pay more than once for the same week of employment regardless of multiple employment. The fee imposed by this article is in addition to all other fess [sic] imposed by the city.

Sec. 2-745. Dedication of revenues.

All revenues generated by the city service fee imposed herein are hereby dedicated to and shall be exclusively utilized for police protection and street maintenance and public works related thereto, and any costs related to the imposition and processing of this fee.

[emphasis added] [Joint Exhibit No. 19]

That the 2003 and 2004 ordinances in question are similar, both in operation and effect, to an ordinance authorized under former W. Va. Code § 8-13-3 (1969) is clear from the following facts: (1) Each ordinance imposes a tax or "fee" per head per time period, either for up to \$2.00 per head per year, or for \$52.00 per head per year. (2) Under each ordinance, the imposition of the tax or "fee" on an individual is triggered, in part, by that individual's relationship with the municipality, either based upon that individual's place of residence or based upon that individual's place of employment. (3) Each ordinance dedicates a significant part of the proceeds from the tax or "fee" to street maintenance.

"The character of a tax is determined not by its label but by analyzing its operation and effect." Syllabus Point 4, City of Huntington v. Bacon, supra. The "fee" imposed by the 2003 and 2004 ordinances is, both in operation and in effect, a municipal capitation tax.

Because of the 1971 repeal of the statutory section that had authorized the imposition of a municipal capitation tax, the imposition of a municipal capitation tax is

now unlawful, as being unauthorized by statute. Because of the ratification of the Capitation Tax Repeal Amendment in 1970, the imposition of a capitation tax at the state or municipal level is also unconstitutional.

In addition to being, in substance, a municipal capitation tax of \$1.00 per head per week, the "fee" imposed by the ordinances in question is, in form, also a municipal income tax, because the earning of income within the corporate limits of the City of Charleston is a trigger to the imposition of the tax, because these ordinances require employers to withhold the tax from the paychecks, or from the direct-deposit pay, of their employees, and because the employers must remit the proceeds to the Defendant.

As of 2003, the only income tax that the West Virginia Legislature had authorized a municipality to impose on at least some individuals was a gross income tax known as the municipal business and occupation (B&O) tax, which the City of Charleston has already imposed.

During its 2004 Regular Session, the Legislature passed another bill, designated Enrolled Committee Substitute for Committee Substitute for Senate Bill No. 701, a copy of which is included as Joint Exhibit No. 28. (JSF-63) By enacting that bill, which conditionally authorizes a "qualifying municipality", on or after July 1, 2005, to impose a "pension relief municipal occupation tax" on a "taxable employee", the Legislature preemptively occupied the field with respect to the imposition of municipal taxes on the earned income of individuals and further invalidated the 2003 and 2004 ordinances, as well as the "user fee" ordinance of the City of Huntington. See W. Va. Code § 8-13C-3 (2004).

Because they are unauthorized by, and inconsistent with, statutes that authorize municipalities to impose income taxes on individuals, the 2003 and 2004 ordinances are unlawful.

Furthermore, these ordinances pose an additional legal problem with respect to sole proprietors. The City of Charleston is already imposing the maximum level of municipal income tax that is authorized by state law. (Answer to Paragraph No. 122 of Mr. Cooper's Complaint) The ordinance of September 15, 2003, imposes an additional fee of \$52.00 per year on a sole proprietor (as of a law office) who is thereunder a "self-employed individual". (Answer to Paragraph No. 125 of Mr. Cooper's Complaint) A copy of Chapter 110 of the Charleston City Code, which imposes a municipal business and occupation tax (B&O tax), is included as Joint Exhibit No. 27. (JSF-50) As Joint Exhibit No. 27 reflects, the Defendant already imposes on most service businesses, such as law offices, "a tax equal to one percent of the gross income of any such business". For example, a law office operated by a sole proprietor who earns \$50,000.00 in 2004 would pay a municipal B&O tax of \$500.00 for that year. By requiring that individual to pay a total of \$552.00 on a gross income of \$50,000.00, the Defendant is actually taxing that individual at the rate of 1.104%, in violation of state law. To the extent that the "fee" causes the City of Charleston to violate state statutes that establish a one-percent (or other) cap on municipal B&O taxes, the 2003 and 2004 ordinances are unlawful.

Because they impose a "fee" that is an unlawful municipal capitation tax, an unconstitutional municipal capitation tax, and an unlawful municipal income tax, the Circuit Court should have declared the 2003 and 2004 ordinances null and void.

Furthermore, the Circuit Court should have declared those ordinances null and void to the extent that the "fee" causes the Defendant to violate the statutory cap on municipal B&O taxes. Instead, the Circuit Court, on page 9 of the order of June 28, 2004, rejected all of these arguments and stated that the "Plaintiffs failed to demonstrate that the User Fee Ordinance imposes a prohibited tax."

Therefore, Mr. Cooper respectfully requests that this Honorable Court reverse the Circuit Court as to his sixth, seventh, eighth, and ninth causes of action and declare that these ordinances are null and void.

G. THE CIRCUIT COURT ERRED BY FAILING TO HOLD THAT THE 2003 AND 2004 ORDINANCES ARE NULL AND VOID INSOFAR AS THEY DEDICATE "FEE" REVENUES FOR PUBLIC IMPROVEMENTS.

In his tenth cause of action, Mr. Cooper alleged that the 2003 ordinance is void insofar as the "fee" revenues are used to fund public improvements.

Pursuant to Charleston City Code § 2-745, in the 2003 and 2004 ordinances, the revenues generated by the "fee" in question "are hereby dedicated to and shall be exclusively utilized for police protection and street maintenance and public works related thereto, and any costs related to the imposition and processing of this fee." (emphasis added) "The 'operation and effect' of using the proceeds to improve streets and municipal infrastructure makes the municipal service fee a tax." City of Huntington v. Bacon, supra, 473 S.E.2d at 753.

To the extent that they dedicate such "fee" revenues for public improvements, the Circuit Court should have declared the 2003 and 2004 ordinances to be of null and void. However, the Circuit Court failed to do so in its order of June 28, 2004.

Accordingly, Mr. Cooper respectfully requests that this Honorable Court reverse the Circuit Court as to his tenth cause of action and hold that the "fee" revenues may not be used to fund public improvements.

H. THE CIRCUIT COURT ERRED BY HOLDING THAT THE 2003 AND 2004 ORDINANCES DO NOT DENY ACCESS TO THE COURTS.

In his eleventh cause of action, Mr. Cooper alleged that the 2003 ordinance is void insofar as it denies certain payers of the fee equal access to the courts.

Because Charleston City Code § 2-743, the section of the 2003 and 2004 ordinances that relates to protests, administrative procedures and decisions, and appeals, denies access to the courts by improperly imposing time limits, the Circuit Court should have declared that section null and void. See generally Toler v. City of Huntington, 153 W. Va. 313, 168 S.E.2d 551 (1969), striking down an ordinance that purported to require a plaintiff to give the municipality a statement of the nature of her claim and of the time and place she received her alleged injury, within thirty (30) days after the date of that alleged injury, as a condition precedent to her right to maintain a civil action against the municipality; and Calabrese v. City of Charleston, *supra*, striking down an ordinance that purported to immunize municipality from claims arising from the operation of its sewer system.

Instead, the Circuit Court, on page 9 of its order of June 28, 2004, upheld the validity of that section of the ordinances.

Therefore, Mr. Cooper also requests that this Honorable Court reverse the Circuit Court as to his eleventh cause of action and declare the provisions of the ordinances that impose these time limits are null and void.

I. THE CIRCUIT COURT ERRED BY HOLDING THAT THE PROVISIONS OF THE 2003 AND 2004 ORDINANCES THAT REQUIRE EMPLOYERS TO WITHHOLD THE "FEE" FROM THE PAY OF EACH EMPLOYEE ARE REASONABLE AND VALID.

In his twelfth and thirteenth causes of action, Mr. Cooper alleged that the 2003 ordinance is void insofar as it unlawfully requires employers to withhold the "fee" from the pay of employees and insofar as it violates a state statute that requires each employer to make full payment to its employees, minus authorized deductions and authorized wage assessments.

There is no language in W. Va. Code § 8-13-13 (1971) that authorizes an employer to withhold from the pay of an employee any fee that is imposed under the provisions of that statutory section. Furthermore, under W. Va. Code § 21-5-3, each employer is required to make full payment to its employees, minus certain authorized deductions and authorized wage assignments, of any salary or wages due at the end of a pay period. Because they violate W. Va. Code §§ 8-13-13 (1971) and 21-5-3, the Circuit Court should have declared Charleston City Code § 2-744, the section of the 2003 and 2004 ordinances that authorizes and requires employers to withhold the "fee" from the pay of employees, and the regulations issued pursuant thereto, null and void. Instead, the Circuit Court, on page 9 of its order of June 28, 2004, upheld the validity of that section of the ordinances.

Accordingly, Mr. Cooper respectfully requests that this Honorable Court reverse the Circuit Court as to his twelfth and thirteenth causes of action and declare that the portions of these ordinances and regulations that authorize or require employers to withhold the "fee" from the pay of employees to be null and void.

J. THE CIRCUIT COURT ERRED BY FAILING TO HOLD THAT THE PROVISIONS OF THE 2003 AND 2004 ORDINANCES, AND OF THE REGULATIONS AND FORMS ISSUED PURSUANT THERETO, THAT AUTHORIZE OR REQUIRE THE DISCLOSURE OR RELEASE OF SOCIAL SECURITY NUMBERS TO EMPLOYEES OR AGENTS OF THE CITY ARE NULL AND VOID BECAUSE THESE PROVISIONS VIOLATE STATE AND FEDERAL LAW.

In his fourteenth cause of action, Mr. Cooper alleged that the 2003 ordinance is void insofar as it requires employers and self-employed individuals to disclose or release Social Security numbers to officials of the Defendant.

Charleston City Code §§ 2-739(1)(c) and 2-740, in the 2003 and 2004 ordinances, regulations issued pursuant thereto, and accompanying forms, require employers and employees to disclose and release employee Social Security numbers to officials and agents of the Defendant and also require self-employed individuals to disclose and release their Social Security numbers to such officials and agents. (Joint Exhibit No. 13, §§ 6-208(a)(3) and 6-209; Joint Exhibit No. 19, §§ 2-739(1)(c) and 2-740; Joint Exhibit No. 16, § 5, "Records and Worksheets"; Joint Exhibit No. 17, Forms CSF-1, CSF-3, and CSF-5)

By requiring employers to disclose and release their employees' Social Security numbers to officials of the City of Charleston, and by requiring self-employed individuals to disclose and release their Social Security numbers to such officials, the ordinances in question, and those regulations and forms, violate the intent behind § 7 of the federal Privacy Act and further violate federal and state statutes, including, but not limited to, 26 U.S.C. § 6103, 26 U.S.C. § 7213(a), and W. Va. Code § 11-10-5d. The Circuit Court should have declared those sections of the 2003 and 2004 ordinances, those regulations, and those forms null and void. Instead, on page 10 of its order of June 28,

2004, the Circuit Court evaded the issue by upholding regulations "requiring employers to keep and maintain certain information including employees' social security numbers". (emphasis added)

Therefore, Mr. Cooper respectfully requests that this Court reverse the Circuit Court as to his fourteenth cause of action and declare that the portions of these ordinances, regulations, and forms that authorize employers or individuals to disclose or release Social Security numbers to officials of the Defendant are null and void.

K. THE CIRCUIT COURT ERRED BY FAILING TO HOLD THAT THE PROVISIONS OF THE 2003 AND 2004 ORDINANCES, AND OF REGULATIONS AND FORMS ISSUED PURSUANT THERETO, THAT REQUIRE STATE AGENCIES TO DO ANYTHING WITH RESPECT TO THEIR EMPLOYEES, ARE NULL AND VOID BECAUSE THESE PROVISIONS VIOLATE STATE LAW.

In his fifteenth cause of action, Mr. Cooper alleged that the 2003 ordinance is void insofar as it requires state agencies to do anything with respect to their employees.

The 2003 and 2004 ordinances contain a number of provisions imposing duties on state agencies insofar as they are employers.

Since it is a legal entity that is subordinate to the State of West Virginia, the Defendant, as a general rule, may not lawfully require state agencies, as employers, to do anything with respect to their employees. This principle is derived from a number of provisions, including, but not limited to, Article VI, §§ 35 and 39a, and Article X, § 6, of the West Virginia Constitution.

The Circuit Court should have declared the 2003 and 2004 ordinances, and the regulations and forms relating thereto, insofar as they require state agencies, as employers, to do anything with respect to their employees – including, but not limited to, the withholding of the "fee" from employee pay, the remittance of the proceeds to the

Defendant, and the release or disclosure of employee Social Security numbers to officials and agents of the Defendant -- null and void. Instead, the Circuit Court, on pages 9 and 10 of its order of June 28, 2004, held that the State could not be held liable for the debts of its employees, but did not declare any other burden imposed by the Defendant upon state agencies to be null and void.

Accordingly, Mr. Cooper respectfully requests that this Honorable Court reverse the Circuit Court insofar as it did not fully adopt the positions set forth in his fifteenth cause of action and declare that the provisions of these ordinances, and supporting regulations and forms, are null and void insofar as they require state agencies to do anything with respect to their employees.

L. THE CIRCUIT COURT ERRED BY FAILING TO HOLD THAT THE PROVISIONS OF THE 2003 AND 2004 ORDINANCES, AND OF REGULATIONS ISSUED PURSUANT THERETO, THAT GENERALLY MAKE EMPLOYERS LIABLE FOR THE PAYMENT OF "FEES" UPON THEIR EMPLOYEES, ARE NULL AND VOID BECAUSE THESE PROVISIONS VIOLATE STATE LAW.

In his sixteenth cause of action, Mr. Cooper alleged that the 2003 ordinance is void insofar as it makes state agencies and other employers liable for the debts of their employees.

The 2003 and 2004 ordinances make state agencies and other employers liable for the debts of their employees with respect to the "fees" in question. This liability is imposed by Charleston City Code §§ 2-741 and 2-744 and by regulations imposed pursuant thereto. Since employers, as such, are not "users" of the municipal services that are provided by the Defendant to their employees, those portions of the ordinances in question, and of the accompanying regulations, that purport to make employers liable for their employees' debts with respect to the "fees" in question are in violation of W. Va.

Code § 8-13-13 (1971). The Circuit Court should have declared these sections of the 2003 and 2004 ordinances, and regulations issued pursuant thereto, null and void. Instead, the Circuit Court, on page 10 of its order of June 28, 2004, held that the State could not be held liable for the debts of its employees, but did not extend this holding to apply to all employers.

Accordingly, Mr. Cooper respectfully requests that this Court reverse the Circuit Court insofar as it did not fully adopt the positions set forth in his sixteenth cause of action and declare that the provisions of these ordinances, and supporting regulations, are null and void insofar as they make employers liable for the debts of their employees.

M. THE CIRCUIT COURT ERRED BY HOLDING THAT THE 2003 AND 2004 ORDINANCES DO NOT VIOLATE CONSTITUTIONAL PROVISIONS RELATING TO UNIFORM TAXATION, EQUAL PROTECTION, AND DUE PROCESS.

In his seventeenth cause of action, Mr. Cooper alleged that the 2003 ordinance is void because it violates constitutional provisions relating to uniform taxation, equal protection, and due process.

For example, the imposition of the "fee" by the 2003 and 2004 ordinances is not applied in a fair, uniform, and/or equitable manner among the residents of the City of Charleston, some of whom are required to pay the "fee", and some of whom are not required to pay the "fee". Furthermore, with respect to the imposition of the "fee" on nonresidents of the City of Charleston, it is obvious that, on the average, a nonresident of the City of Charleston receives less benefit from its municipal services than does a resident of the City of Charleston, whether that resident does, or does not, pay the fee.

The Circuit Court should have declared the 2003 and 2004 ordinances null and void because the "fee" violates the Due Process and Equal Protection Clauses of the

Fifth and Fourteenth Amendments to the United States Constitution, the Due Process Clause of Article III, § 10, of the West Virginia Constitution, and the tax uniformity provision of Article X, § 9, of the West Virginia Constitution. Instead, on page 10 of its order of June 28, 2004, the Circuit Court rejected these arguments.

Accordingly, Mr. Cooper respectfully requests that this Honorable Court reverse the Circuit Court as to his seventeenth cause of action and declare that these ordinances are null and void.

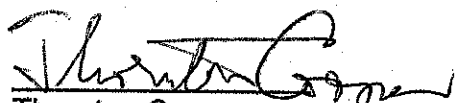
V. THE RELIEF PRAYED FOR.

For the reasons set forth hereinabove, Mr. Cooper prays that this Honorable Court reverse the order of the Circuit Court of Kanawha County issued on June 28, 2004, in Civil Actions Nos. 04-C-122 and 04-C-408; declare the "fee" ordinances of September 15, 2003, and June 7, 2004, and supporting regulations and forms, null and void; enjoin the Defendant from enforcing them; overrule conflicting cases; require the Defendant to make full refunds to all affected employers and individuals; award Mr. Cooper his costs; and grant any other relief that this Court may deem appropriate.

Respectfully submitted,

THORNTON COOPER

Pro Se


Thornton Cooper
3015 Ridgeview Drive
South Charleston, WV 25303
West Virginia State Bar No. 823
(304) 744-9616 (home)

Dated: May 11, 2005

CERTIFICATE OF SERVICE

I, Thornton Cooper, the Plaintiff below and the Appellant herein, do hereby certify that I have served the foregoing "Appellant's Initial Brief" upon the City of Charleston, the Defendant below and the Appellee herein, by mailing one (1) copy thereof to the office of one of its attorneys, Charles O. Lorensen, Esq., at 1526 Kanawha Boulevard, East, Charleston, WV 25311, and by mailing another copy thereof to the office of another of its attorneys, Karen Tracy McElhinny, Esq., Shuman, McCuskey & Slicer, P. O. Box 3953, Charleston, WV 25339, all on this 11th day of May, 2005.


Thornton Cooper