

**APPEAL NO. 32612**

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**CHARLESTON**

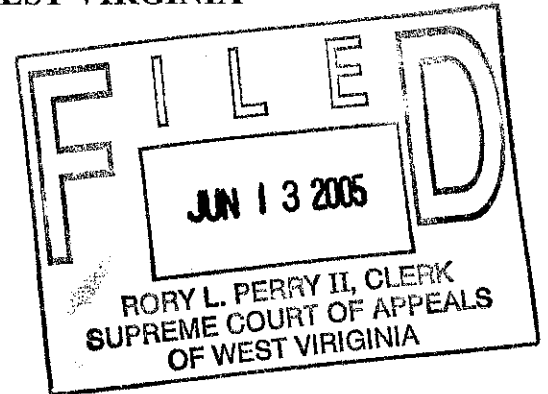
**THORNTON COOPER,**

**Appellant,**

**v.**

**CITY OF CHARLESTON,**

**Appellee.**



**APPELLEE'S BRIEF**

**CITY OF CHARLESTON**

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**Appellee.**

**I. INTRODUCTION AND STATEMENT OF THE CASE**

Thornton Cooper, a lawyer who is also a *pro se* litigant, challenges the lower court's decision to uphold Charleston's 2003 service fee ordinance ("ordinance") that was designed to provide funds for police protection and street maintenance services provided to individuals employed within the City. In his thirty-page, seventeen-count Complaint for Declaratory and Injunctive Relief, Appellant Cooper raised both procedural and substantive challenges to the ordinance.

The Circuit Court of Kanawha County, after a complete hearing of all evidence presented by the parties in open court, extensive briefs, and arguments of counsel, entered a Final Order with extensive findings of fact and conclusions of law denying the relief requested in Appellant Cooper's Motion for Summary Judgment. The Circuit Court rejected Cooper's procedural causes of action as moot and upheld the ordinance as valid

and constitutional except for the portions of the ordinance that might render the State liable for the debts of State employees. (Final Order at p. 10.)

Cooper now appeals from that order, asking this Court to invalidate the ordinance both on the moot procedural grounds and on substantive grounds. Cooper requests that this Court disregard the Circuit Court's extensive findings<sup>1</sup>, reject the Charleston City Council's determinations, and invalidate the ordinance as being "imprudent and inequitable." (Appellant's Initial Brief.)<sup>2</sup>

## **II. STATEMENT OF FACTS**

Led by elected municipal authorities including the Mayor and the twenty-seven-member City Council, Charleston's municipal government provides services benefitting individuals who reside, work, and visit there. To pay for these services, Charleston imposes several separate taxes and fees.

Prior to September 2003, Charleston did not charge a separate fee for police protection and street maintenance services. Instead, Charleston paid the entire cost of providing these services out of the general municipal revenues raised by authorized taxes.

In September 2003, Charleston City Council adopted the ordinance, patterned after the an earlier ordinance passed by Huntington's City Council. The Charleston ordinance declares that being employed within the City is evidence of use of municipal services and

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<sup>1</sup>In Appellant's 13-page Statement of Facts, Mr. Cooper chose to ignore the Circuit Court's extensive factual findings.

<sup>2</sup>The ordinance was initially challenged by State Auditor, Glen B. Gainer, III, but the Auditor chose not to appeal the Circuit Court's decision. This Court, pursuant to a motion previously made by the Auditor, removed the Auditor's name from the title of this Appeal.

exacts a one dollar per week charge on each employee and self-employed person working within the City limits. In enacting the ordinance, City Council made the following specific findings:

- (a) The City provides to all individuals within its borders certain services, whether they are resident employed within the City, or individuals living outside the City and employed within the corporate boundaries of the City.
- (b) Such services provide police protection and traffic and street maintenance and other valuable services associated with the police department and public works department.
- (c) Such services are within the authority and are the responsibility of the municipal government of the City of Charleston as provided under the laws of the State of West Virginia.
- (d) Such services are essential to the creation and maintenance of those jobs which provide livelihood to all individuals employed within the City, as well as to the property interests of residents and visitors to the City, it is therefore, reasonable to derive a portion of the cost of providing and maintaining such services from said individuals.
- (e) West Virginia Code 8-13-13 provides that every municipality has the plenary power and authority to provide by ordinance for the installation, continuance, maintenance or improvement of such services, to make reasonable regulations with respect thereto, and to impose by ordinance upon the users of such services reasonable rates, fees and charges to be collected in the manner prescribed in the ordinance.

- (f) All of those individuals, who use, enjoy and benefit from these services, should bear an equitable share of the costs thereof.
- (g) The imposition of the City Service Fee established herein is a reasonable system of distributing the costs to all of the users that the City can reach through reasonable and prudent means and legislation.
- (h) The Legislature of the State of West Virginia has conferred upon municipalities the plenary power to enact reasonable administrative provisions to ensure the efficient, orderly and equitable implementation and collection of the service fees from all users.
- (i) It is in the best interests of the citizens of the City of Charleston and the users of City services to enact . . . a City Service Fee.
- (j) Tens of thousands of individuals . . . benefit from municipal services who are not owners of property or residents of the City of Charleston, but who are employed within the City.

(Chas. Code § 6-203.)

Moreover, the ordinance states:

[a]ll revenues generated by the City Service Fee imposed herein are hereby dedicated to and shall be used exclusively for police protection and street maintenance and public works projects related thereto, and any costs related to the imposition and processing of this fee.

(Chas. Code § 6-214.)

The Circuit Court found that, prior to passage of the ordinance, the Charleston Chief of Police advised City Council that, based upon his years of experience in law enforcement, “Resident and nonresident individuals who regularly work in Charleston are substantial, ongoing users of the Department’s public safety services.” (Final Order at p. 4.) Additionally, the Director of Public Works for the City, advised City Council prior to passage of the ordinance that, “significant use [of the streets by workers in the City] fosters street maintenance services undertaken by the Public Works Department.” (Id.) Moreover, the record reflects that a relatively large percentage (37%) of reported criminal incidents investigated by the Charleston Police Department involve nonresidents.

The City’s 2005 fiscal year budget expends over \$19 million combined on police protection and street maintenance services. (Final Order at p. 5.) The City estimated collections of approximately \$2.5 million from the service fee for the same period. Id. Accordingly, the service fee financed approximately 12.7% of the overall cost of police protection and street maintenance services provided the City.

### **III. RESPONSES TO ASSIGNMENTS OF ERROR**

The City responds to Appellant Cooper’s Assignments of Error as follows:

1. The Circuit Court correctly found that Cooper’s procedural criticisms of the notice provided by the City prior to passage of the ordinance were mooted when the Council re-passed the ordinance. The Circuit Court correctly found that the City complied with all procedural and notice requirements upon re-passage of the ordinance.

2. The Circuit Court correctly found that, pursuant to West Virginia Code § 8-13-13 as interpreted by this Court, the City was not required to provide yet another notice of the ordinance after it was adopted.

3. The Circuit Court correctly found that the effective date of the re-enacted ordinance is valid. Generally, there is no rule against retroactive legislation unless it interferes with contract or vested rights.

4. The Circuit Court correctly found that the City's ordinance is valid because it falls squarely with the plenary power afforded municipalities. West Virginia Code § 8-13-13 does not require that municipalities limit their service fees to individuals who own or occupy real property within City limits.

5. The Circuit Court correctly upheld the ordinance, finding that the Plaintiffs failed to meet their burden of proving the ordinance clearly unreasonable. The Circuit Court found that the ordinance reasonably serves the purpose for which it was enacted, to pay costs associated with providing police protection and street maintenance services to individuals employed within the City of Charleston. Perfect equity is not the test.

6. The Circuit Court correctly found that the City's ordinance does not impose a prohibited tax. The Circuit Court correctly found that the primary purpose of the service fee is to cover the expense of providing a service. All revenues generated by the ordinance shall be used exclusively for police protection and street maintenance and public works projects related thereto and, as such, will not be used to fund unrelated governmental functions or services.

7. The Circuit Court correctly found that the service fee is appropriate and valid and is only imposed to cover expenses of providing street maintenance and police protection services.

8. The Circuit Court appropriately held that the ordinance's administrative provisions do not deny access to the courts.

9. The Circuit Court correctly found that collection procedures and regulations in the ordinance are appropriate and within the Legislature's grant of plenary authority under West Virginia Code § 8-13-13. The City of Charleston's decision to collect the service fee through a withholding process from employers as a class is reasonably within the powers granted in the statute.

10. The Circuit Court correctly held that the ordinance and accompanying regulations and forms do not authorize improper or illegal disclosure of employees' Social Security Numbers. Regulations requiring employers to keep and maintain certain information including employee's Social Security Numbers is not a violation of any Federal or State statute and is within the powers granted in West Virginia Code § 8-13-13.

11. The Circuit Court correctly found that the ordinance may properly require State agencies as well as private employers to withhold the service fee and such administrative procedures are within the powers granted in West Virginia Code § 8-13-13.

12. The Circuit Court properly found that there is no prohibition against making private employers responsible for the payment of service fees on behalf of their employees. This administrative regulation is fully within the powers granted in West Virginia Code § 8-13-13.

13. The Circuit Court properly found that the ordinance does not violate equal protection, uniform taxation, or due process guarantees. The elected governing body's classification of employees and self-employed persons working regularly within the City as "users" of the City's street maintenance and police protection services is reasonable and rational and does not result in a prohibited double assessment against resident employees.

#### **IV. AUTHORITY AND DISCUSSION OF LAW**

##### **A. Charleston's Original Notice was Proper and, Moreover, Appellant Cooper's Criticism of the City's Notice is Moot as the City Reenacted the Ordinance in Accordance with This Court's Interpretation of West Virginia Code § 8-13-13.**

While the City maintains that its original publication of notice concerning the ordinance was appropriate and fully in compliance with West Virginia Code § 8-13-13, it is not necessary for this Court to reach the notice issues because the City has reenacted the ordinance. The City's second legal advertisement contained all of the items which Appellant Cooper contended below should be in the notice, and, therefore, the procedural challenges to the ordinance are moot. Further, the City provided pre-adoption notice of

the ordinance which is the only notice required by West Virginia Code § 8-13-13 as interpreted by this Court.

**1. The procedural challenges to Bill No. 7002 are moot and should not be considered.**

In Velogol v. City of Weirton, 212 W.Va. 687, 575 S.E.2d 297 (2002), this Court held that courts will generally not decide a moot question. Syl. pt. 1, Velogol, 212 at 687, 575 S.E.2d at 297. In Velogol, the City of Weirton passed a police and fire service fee pursuant to West Virginia Code § 8-13-13. Id. Citizens filed a declaratory judgment action challenging that fee both on procedural (notice) grounds and on substantive grounds. Id. The circuit court, after holding an evidentiary hearing in July of 2001, upheld the ordinance, but the plaintiffs appealed. 212 W.Va. at 688, 575 S.E.2d at 298. While the appeal was pending, in September of 2002, Weirton amended and reenacted its ordinance, curing both the alleged substantive and procedural defects. 212 W.Va. at 688, 575 S.E.2d at 298. This Court found that the issues presented in the appeal were rendered moot by the amendment and reenactment of the ordinance. 212 W.Va. at 689, 575 S.E.2d at 299. This Court further found that the City of Weirton was entitled to retain the fees collected under the original ordinance because the amended ordinance was made retroactive. Id. at fn. 3.

In the case at bar, just as in Velogol, the procedural challenges are rendered moot, i.e., are reduced to abstract propositions, by the City's reenactment of the ordinance. While the Charleston does not believe it is required by West Virginia Code § 8-13-13, the

City included in the notice of Bill No. 7070 (the re-enacted ordinance) all of the items which Cooper contended in his Complaint should be included in the notice: the date of a public hearing on the proposed ordinance, that portion of West Virginia Code § 8-13-13 that outlines the rights of citizens to gather signatures for a petition to force a referendum, and a full text of the ordinance to be considered. Therefore, all of Cooper's procedural challenges to the original ordinance (the same allegations contained in Cooper's first assignment of error) are moot, and it would be "an exercise in futility for this Court to undertake an analysis" of the ordinance as originally enacted. *See, Velogol*, 212 W.Va. at 689, 575 S.E.2d at 299.

- 2. West Virginia Code § 8-13-13, as interpreted by this Court, does not require post-adoption notice, and, as such, the City complied with all existing procedural requirements.**

The City, in re-passing the ordinance, followed the guidance provided by this Court that specified that publication of ordinances passed pursuant to West Virginia Code § 8-13-13 should be accomplished in advance of the passage of the ordinance.

Specifically, in *Nine v Grant Town*, 190 W.Va. 86, 87, 437 S.E.2d 250, 251 (1993), this Court held that:

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

Syl. Pt. 1, Id. Therefore, it is appropriate for this Court to uphold the lower court's ruling and reject Appellant Cooper's procedural challenge to the City's re-passage of the user fee ordinance.<sup>3</sup>

**3. The Circuit Court correctly ruled that the City of Charleston's reenactment of the ordinance was valid and could be applied as of the original effective date.**

As this Court noted in Velogol, "Generally, there is no rule against retroactive legislation unless it interferes with contract or vested rights." Velogol, 212 W.Va. at 689, 575 S.E.2d at 299 (citing McQuillan, *The Law of Municipal Corporations*, Section 20.70 (3d Ed. 1998), internal quotations omitted). Revenue or tax laws that are retroactive do not constitute a deprivation of property without due process. Unites States v. Hemme, 476 U.S. 558, 106 S.Ct. 2071, 90 L.Ed.2d 538, (1986); United States v. Darusmont, 449 U.S. 292, 297, 101 S.Ct. 549, 552, 66 L.Ed.2d 513 (1981).

In the case at bar, the City's reenactment of the ordinance to apply "retroactively" to the time the original ordinance took effect (January 1, 2004) does not constitute a fatal flaw or a violation of any constitutional right. As such, it was appropriate for the lower court to uphold the ordinance and to allow the City to apply retroactively irrespective of any purported notice flaws in connection with the initial adoption of the ordinance.

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<sup>3</sup>If this Court were to reverse syllabus point 1 of Nine v. Grant Town, as urged by Appellant Cooper, such a reversal should be prospective, insofar as Charleston and other West Virginia municipalities have relied upon this syllabus point in enacting and substantially amending W.Va. Code § 8-13-13 ordinances for a dozen years.

4. **The original notice complied with West Virginia Code § 8-13-13; it contained the full text of the proposed ordinance and it was published as a Class II legal advertisement.**

Even if this Court declines to find the notice challenge moot, the City's original notice complied with the provisions of West Virginia Code § 8-13-13, and other statutory notice provisions in the Code, including those contained in West Virginia Code § 8-11-4 (a) relied upon by Cooper, do not apply. The plain language of West Virginia Code § 8-13-13 specifies that the provisions of West Virginia Code § 8-11-4 (a) do not apply to fees enacted under the authority granted to municipalities under West Virginia Code § 8-13-13.

Additionally, the plain language of West Virginia Code § 8-11-4(a) states that its publication requirements do not apply, "where different or additional requirements are specified in other provisions of this code, in which event such other different or additional requirements shall be applicable...." West Virginia Code § 8-13-13 imposes different requirements than those imposed by West Virginia Code § 8-11-4; ordinances enacted pursuant to West Virginia Code § 8-13-13 must be published as Class II legal advertisement whereas ordinances governed by West Virginia Code § 8-11-4 need only be published as a Class I-0 legal advertisement. Additionally, the two statutes mandate that different information be included in the legal advertisement.<sup>4</sup>

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<sup>4</sup>Notices regarding § 8-13-13 ordinances must contain the text of the proposed ordinance whereas notices regarding § 8-11-4 ordinances need not contain the full text of the proposed ordinance, but they must state the subject matter and general title or titles of such proposed ordinance, the date, time and place of the proposed final vote on adoption, and the place or places within the municipality where such proposed ordinance may be inspected by the public. It makes no sense to require notices for ordinances passed under West Virginia Code § 8-13-13

The original notice published by the City fully complied with West Virginia Code § 8-13-13. The City caused a Class II legal advertisement to be published in the Charleston newspapers on August 28, 2003 and September 4, 2003. (Final Order at p. 3.) The advertisement contained the full text of the proposed ordinance, Bill No. 7002. (Id.)

Furthermore, West Virginia Code § 8-13-13 does not require republication of the ordinance when minor modifications to the ordinance are made prior to passage. The plain language of the statute states that, “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...” West Virginia Code § 8-13-13 (1971) (emphasis added). Before a City is required to publish another legal notice, the ordinance must be substantially amended. In the case at bar, the original ordinance was not substantially amended. The proposed ordinance was a proposed one dollar per week fee for persons employed within the city limits of Charleston. The ordinance which passed was a one dollar per week fee for persons employed within the city limits of Charleston. While Mr. Cooper lists various minor Finance Committee changes to the text of the bill, the substance of the bill remained exactly the same as that which was published. Therefore, there was no requirement that Council postpone voting on the ordinance and publish another round of Class II legal advertisements.

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to contain the information required under § 8-13-13 and the information required under § 8-11-4(a); e.g., if the public has the full text of the proposed ordinance it does not make sense to provide the public with a summary of the ordinance and the titles of the ordinance.

**B. Neither West Virginia Code § 8-13-13 Nor This Court's Decisions Restrict Municipalities' Plenary Power to Impose Service Fees to Fees Imposed Based Upon Residency or Property Ownership.**

The Circuit Court properly concluded that the ordinance falls squarely within the broad grant of plenary power granted by the Legislature in West Virginia Code § 8-13-13. The law does not restrict the City to charging only people who own property or reside within its boundaries for services. Rather, the Legislature granted municipalities the following broad powers and authority:

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, parking facilities, parks and recreational facilities, street cleaning, street lighting, street maintenance and improvement, sewerage and sewage disposal, 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 . . . .

West Virginia Code § 8-13-13 [1971]. Nowhere in this Code provision did the Legislature preclude municipalities from charging nonresidents and non-property owners for such services. Indeed, to do so would prevent municipalities from charging for other enumerated services such as the use of parking and recreation facilities. Instead, the Legislature chose to give municipalities such as Charleston broad power to provide such services, to regulate such services, and to charge for such services.

Additionally, this Court has never interpreted West Virginia Code § 8-13-13 as permitting municipalities to only charge residents or property owners for services. The only requirement imposed is that the ordinance reasonably serve the purpose for which it was enacted. City of Huntington v. Bacon, 196 W.Va. 457, 467, 473 S.E.2d 743, 753 (1996). This Court adopted a deferential standard of review of ordinances imposed pursuant to West Virginia Code §8-13-13:

The standard of review of an ordinance exercising such power as that granted by W.Va. Code, 8-13-13 [1971] is the reasonableness of the ordinance . . . . The determination of whether an ordinance reasonably serves the purpose for which it was enacted is initially made by the municipal authorities. Their passage of the ordinance gives it a presumptive validity and a court should not hold the ordinance to be invalid unless it is clear that the ordinance is unreasonable.

Ellison v. City of Parkersburg, 168 W.Va. 468, 472, 284 S.E.2d 903, 906 (1981)(internal quotations omitted). Thus the recurring theme among this Court's 8-13-13 jurisprudence is not, as Appellant Cooper asserts, property occupancy and ownership, but rather is deference to legislative decisions made by municipal authorities.

A brief review of this Court's reasoning in the cases cited by Appellant Cooper reveals that property ownership and occupancy is not a prerequisite to municipal service fees. For example, in City of Huntington v. Bacon, this Court did not base its decision on property ownership or residency, but rather deferred to the municipalities' conclusion that these individuals use the specific services at issue - fire and flood protection. The Bacons and the Board of Education took the position that Huntington's service fee for fire and

flood protection was unreasonable because it was not imposed upon other potential users of fire department services such as people involved in automobile accidents, hazardous materials spills, tenant's fires, and vacant lots. 196 W.Va. at 468, 473 S.E.2d at 754. This Court found that "charges for services cannot be equally achieved upon all users" and that, "although the municipal service fee is not imposed upon all users of the City's fire and flood protection services, common sense dictates that owners of property benefit most by these services. Thus, the ordinance reasonably imposes a service fee which is sufficiently related to the use of the City's fire and flood protection services." 196 W.Va. at 469, 473 S.E.2d at 755.

Appellant's limitation of the scope of cases he discusses to cases that all involve service fees relating to real property creates his artificial (and non-existent) property owner/occupier distinction. Specifically, five of the eight cases cited by Appellant involve fire and/or flood protection fees. See, McCoy v. Sistersville, 120 W.Va. 471, 199 S.E. 260 (1938); City of Charleston v. Board of Education, 158 W.Va 141, 209 S.E.2d 55 (1974); Bacon, 196 W.Va. 457, 473 S.E.2d 743; City of Clarksburg v. Grandeotto, 204 W.Va. 404, 513 S.E.2d 177 (1998); Dean v. Town of Addison, 207 W.Va. 538, 534 S.E.2d 403 (2000). Indeed, the only non-fire/flood fee cases cited by Appellant involve the disposal or solid waste or refuse (Ellison v. Parkersburg, 168 W.Va. 468, 284 S.E.2d 903 (1981)(upholding a municipal ordinance placing charge of solid waste collection disposal services on owners of real property)); Princeton v. Stamper, 195 W.Va. 685, 466 S.E.2d 536 (1995)(upholding city ordinance imposing residential refuse collection and

disposal fee), and an ambulance service fee (Clay County Citizens for Fair Taxation v. Clay County Commission, 192 W.Va. 408, 452 S.E.2d 724 (1994)). The nature of the services at issue in this case (police and street maintenance services) are largely personal in nature, directed at the protection of human life and the preservation of order, whereas the services at issue in the cases cited by Appellant (fire/flood protection and the disposal of waste) are largely related to the protection of real property.

Appellant's citation to case law from Pennsylvania is equally unavailing. First, it is important to note that not only is this case law not binding precedent on this Court, but because each state has different municipal tax and fee legislation, the interpretation of another jurisdiction's tax and fee law is not germane to the discussion at hand. Second, if this Court is inclined to look to case law from Pennsylvania in order to adjudicate this dispute, more recent case law from Pennsylvania has upheld occupation taxes imposed upon resident and nonresident individuals.<sup>5</sup> Even in Pennsylvania, there is no prohibition

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<sup>5</sup>Specifically, in Gaugler v. Allentown, 410 Pa. 315, 189 A.2d 264 (1963), the Supreme Court of Pennsylvania held that a city ordinance imposing a tax of ten dollars per annum on each individual, resident and nonresident, engaged in an occupation within the corporate limits of the city was valid and enforceable. 410 Pa. at 319, 189 A.2d at 266. The Court specifically addressed the two cases cited by Appellant, Danyluk v. Johnstown, 406 Pa. 427, 178 A.2d 609 (1962) and Guernsey v. Borough of Midland, 197 Pa. Super. 394, 178 A.2d 782 (1962), and noted that their factual situations were distinguishable in that in Danyluk,

[i]t was admitted therein that the tax involved was intended to be a per capita or head tax on residents and nonresidents. This admission, coupled with the fact that the tax bore none of the incidents *that generally* are found in a true Occupation Privilege Tax led the Court to conclude that the tax was not an occupation tax. We did not intend to rule that an occupation tax in order to be valid must of necessity vary according to the value of the mode of employment.

Id.

against charging a flat fee for all individuals for the privilege of working within the limits of a municipality.

In the instant case, Charleston's service fee is sufficiently related to the use of the City's police protection and street maintenance services. While it is possible (as it always is with any service fee) to concoct examples of inequity, Charleston's elected officials determined rightly that people who work in the City derive a benefit from the police protection and street maintenance services provided by the City. The ordinance states that, "[a]ll revenues generated by the city service fee imposed herein are hereby dedicated to and shall be used exclusively for police protection and street maintenance and public works projects related thereto, and any costs related to the imposition and processing of this fee." (Chas. City Code § 6-215)

Charleston is the primary commercial hub and employment center in the Kanawha Valley. Charleston's elected governing body regularly observes resident and nonresident workers streaming into high density employment districts from neighboring areas. The City provides police protection and street maintenance services to residents and nonresidents alike in connection with workday peak activities, which directly affect (among other things) police staffing levels and shift patterns and street repair needs. Further, the Circuit Court found that the Charleston Chief of Police, based upon his years of experience in law enforcement, concluded that "resident and non-resident individuals who regularly work in Charleston are substantial, ongoing users of the Department's public safety services." (Final Order at p. 4.) Any individual who works within the City

of Charleston benefits from indirect services the Charleston Police Department provides, including traffic control and crime deterrence.

Additionally, workers within Charleston obtain daily benefit from the roads maintained by Charleston's Street Department. The Director of Public Works for the City, advised City Council that workers' "significant use [of City streets] fosters street maintenance services undertaken by the Public Works Department." (Id.)

While much of the benefit individuals employed within the City derive from City law enforcement and street maintenance services may be of the type which is not directly measurable (and perhaps the type which one only notices when it is not present - the pothole which does not get filled, the mugger who attacks as one walks to one's car after working late), that does not make it any less real.<sup>6</sup>

There is a reasonable relationship between the total usage of police and street services by employed individuals and the relative percentage of the total budget for those services they would be supplying. The total percentage of the City's overall police and street budget which individuals employed within the City would contribute through the service fee is limited. The City estimates it will collect \$2.5 million in fiscal year 2005 from the service fee. (Final Order at p. 5.) This estimated \$2.5 million will fund 12.7% of the overall cost of police protection and street maintenance services provided by the City. Id.

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<sup>6</sup>Note also that a relatively large percentage (37%) of the reported crime investigated by the Charleston Police Department involves nonresidents. (Joint Stipulation of Facts at ¶ 66.)

**C. Appellant Cooper Failed to Meet His Burden of Proving the Ordinance Clearly Unreasonable.**

As noted above, this Court has found § 8-13-13 ordinances presumptively valid and that a Court should not invalidate such an ordinance unless it is clearly unreasonable. Ellison, 168 W.Va. at 472, 284 S.E.2d at 906. The standard is not, as the Appellant suggests, whether the fee is “ideal” or even “prudent.” The burden of proof is upon Appellant Cooper to prove the fee is clearly unreasonable, that is, that it clearly fails to reasonably serve the purpose for which it was enacted. Id.

Furthermore, this Court noted that “[w]e recognize that perfect equity is impossible to achieve in any tax scheme, but perfect equity is not the test.” Clay County Citizens for Fair Taxation v. Clay County Commission, 192 W.Va. 408, 411, 452 S.E.2d 724, 727 (1994).<sup>7</sup> In case after case, this Court has rejected arguments similar to those posited by Appellant Cooper that a service fee unfairly burdens one group or another. See, Dean v. Town of Addison, 207 W.Va. 538, 541, 534 S.E.2d 403, 406 (2000) (rejecting argument of Town residents that fire service fee used to support local volunteer fire department was inequitable and in violation of the equal protection clauses of the State and Federal Constitutions because people living outside the corporate limits did not have to pay for the same protection); City of Huntington v. Bacon, 196 W.Va. at 468, 473 S.E.2d at 755 (rejecting argument of the Bacons and the Board of Education that the municipal service fee for fire and flood protection services is unreasonable because it is

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<sup>7</sup>Clay County Citizens involved a challenge to an emergency services fee imposed pursuant to West Virginia Code § 7-15-17, but the Court in the later decision of City of Huntington v. Bacon found that it was a similar statutory provision.

not imposed upon all users of the fire and flood protection services); Princeton v. Stamper, 195 W.Va. 685, 688, 466 S.E.2d 536, 539 (1995) (rejecting appellant's argument that it is unfair to charge them a refuse disposal fee because they do not utilize city refuse disposal services); Clay County Citizens, 192 W.Va. at 411, 452 S.E.2d at 727 (1994) (rejecting appellant's assertion that the fee scheme of charging each household twenty-five dollars per year just for ambulance services is inequitable because a single person living in an apartment pays the same twenty-five dollars that the head of a ten-child household pays while the owner of a hunting camp that is used only occasionally pays nothing).

Thus, a municipal fee ordinance is not invalid merely because a litigant can conjure up examples of inequities. Rather, a litigant such as Appellant Cooper has the burden of proving that the ordinance clearly fails to reasonably serve the purpose for which it was enacted. The Circuit Court properly concluded that Cooper did not and cannot show that the ordinance clearly fails to reasonable serve the purpose of funding a reasonable portion of City-provided police protection and street maintenance services. Charleston's elected officials made reasonable legislative determinations to this effect that are entitled to deference.

**D. The Circuit Court Correctly Held that Charleston's Service Fee is a Fee and Not a Tax.**

Charleston's service fee falls squarely within the definition of "fee" provided by this Court in previous decisions and does not constitute an illegal or unconstitutional

capitation tax, income tax, or B&O tax. This Court, “has generally operated on the premise that charges for services rendered by a municipality are user fees and not taxes.” City of Huntington v. Bacon, 196 W.Va. at 467, 473 S.E.2d at 753. “This premise is based on the following definitions of tax and fee: ‘[T]he primary purpose of a tax is to obtain revenue for the government, while *the primary purpose of a fee is to cover the expense of providing a service* or of regulation and supervision of certain activities.’” Id. (Citing River Falls v. St. Bridget’s Catholic Church, 182 Wis.2d 436, 513 N.W.2d 673, 675 (App.1994)). All proceeds from Charleston’s service fee will not fund general services (as would be the case with tax revenues) but rather are used to pay a portion of the expenses of providing police protection and street maintenance services to individuals who work in Charleston. (Chas. Code § 6-214.) Thus, Charleston’s service fee falls within the definition of a fee applied by this Court and as such cannot be considered a capitation tax, municipal income tax or a B&O tax.

Furthermore, Charleston’s service fee is not an unconstitutional capitation tax. The former state capitation tax was imposed upon all male residents of the state who had attained the age of 21 years and was appropriated to support the public schools. (Joint Stipulation of Facts, at ¶ 43.) The only similarity between Charleston’s user fee and the capitation tax is that they both involve one dollar (although the user fee is one dollar per week whereas the capitation tax was one dollar per year). (Joint Stipulation of Facts, at ¶ 43.)

The differences between the service fee and the capitation tax are substantial. Unlike the capitation tax, Charleston's service fee is not a tax. Perhaps most importantly, Charleston's service fee is imposed upon individuals based upon their usage of City services, not the fact that they live in the state, are male, and have reached the age of majority. Indeed, the individuals who were obligated to pay the capitation tax would by definition not be the individuals who would be using the service the tax was appropriated to support, the public schools; they would be too old to be attending the public schools. The Charleston service fee, in contrast, is paid by individuals who use the services the fee is designed to support, police and street services.

Moreover, legislation passed by the Legislature in the 2004 Regular Session discussed in Cooper's Brief is irrelevant to this Appeal. Some provisions of Senate Bill 701 cited by Mr. Cooper apply only to municipalities which have underfunded pension plans, and it appears that Huntington is the only municipality which would fall within the definitions of "qualifying municipality." (See, Joint Exhibit 28.)

Senate Bill No. 701 does not repeal or otherwise affect the provisions of West Virginia Code § 8-13-13, and does not preclude Charleston from charging reasonable fees for city services such as street maintenance and police protection services. Instead, Senate Bill 701 grants additional powers to municipalities. Furthermore, the courts do not favor "implied repeal." See, Syl. pt. 2, In re Sorsby, 210 W.Va. 708, 559 S.E.2d 45 (2001). Therefore, it is appropriate to uphold the ordinance against a claim that 2004

legislation (not yet effective) that expands municipal taxing authority was intended to repeal or amend W.Va. Code § 8-13-13.

**E. The Circuit Court Correctly Upheld the Ordinance Because the Service Fee Will Not Fund Anything Other than Police Protection Services and Street Maintenance and Therefore is an Entirely Appropriate Municipal Service Fee.**

Cooper also argues that the ordinance is flawed as to how funds are dedicated.

However, the proceeds from Charleston's service fee are used to cover expenses associated with providing police services and street maintenance to individuals who work in Charleston. (Chas. Code at § 6-214.) Section 6-214 of the ordinance states that:

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 projects related thereto, and any costs related to the imposition and processing of this fee.

(Chas. Code at § 6-214.)(emphasis added.)

The plain language of the ordinance demonstrates that the fee will be exclusively used to provide police services and street maintenance, the exact items for which the fee is charged. The quotation Appellant Cooper takes out of context from City of Huntington v. Bacon in his Brief (at page 37) is inapposite; the Huntington fee was for fire and flood protection services (not street maintenance), so the use of flood and fire protection fees to improve streets and municipal infrastructure would be inappropriate. See, 196 W.Va. at 467, 473 S.E.2d at 753. Note that this Court was not willing to strike down the Ordinance in Bacon even though Huntington had in the past used the funds for items other than that for which they were earmarked. 196 W.Va. at 468, 473 S.E.2d at 754. In

the case at bar, the funds are earmarked for police protection and street maintenance, have been used only for police protection and street maintenance, and have and will be used to provide police protection and street maintenance.

**F. The Circuit Court Correctly Rejected Appellant Cooper's Challenge That the Ordinance Denies Access to the Courts; the Administrative Procedure Outlined in the Ordinance is Appropriate.**

Section 6-212(c) of the ordinance does not deny access to the courts, rather, it establishes an administrative procedure which aggrieved parties must use prior to court involvement. Section 6-212(b) specifically states that "if aggrieved by the decision of City Collector, the protesting party may appeal the decision of the City Collector to **the Circuit Court of Kanawha County within 30 days after the service of the City Collector's decision.**" (Joint Exhibit No. 13, § 6-212(b)(emphasis added)). Thus, the final decision on a payers' claim for refund of the fee still lies with the Circuit Court. Appellant, while focusing on provisions of the ordinance which only serve to establish a timeframe in which to file an appeal, ignores the provisions of Section 6-212, which specifically gives aggrieved claimants the right to appeal a negative decision by the City Collector to the Circuit Court of Kanawha County.

The thirty day timeframe in which to file an appeal of a denial of a claim for refund is a reasonable limit much like the limited amount of time an individual has in which to challenge a parking ticket. Such a time limit is necessary for the prompt and efficient administration of justice and resolution of disputes regarding the fee, and is fully

within the power to administer service fees granted to the City under West Virginia Code § 8-13-13.

Therefore, § 6-212(b) clearly affords aggrieved party's the right to appeal an adverse decision to the Circuit Court of Kanawha County. Payers of the fee are not denied access to the courts. As the right to appeal is fully preserved, Appellant Cooper's claim that the ordinance should be struck down because payors of the fee are denied access to the courts must be rejected.

**G. The Circuit Court Correctly Held that the Provision in the Ordinance that Requires Employers, Private As Well As Public, to Withhold the Fee From the Pay of Each Employee is Reasonable, Valid, and Constitutional.**

The withholding procedures required by the ordinance fall squarely within the plenary power granted to municipalities pursuant to West Virginia Code § 8-13-13. As noted above, West Virginia Code § 8-13-13 grants municipalities plenary power and authority to provide police protection and street maintenance services, to charge for said services, and also to make reasonable regulations with respect thereto. West Virginia Code § 8-13-13 [1971]. When a charge is imposed upon a reasonable user classification comprised of employees, it is logical to call upon existing employer payroll withholding procedures to facilitate collection. The ordinance does not create a substantial new or unique burden: employers already regularly withhold sums from employees' periodic paychecks. Indeed, by aggregating remittances, an employer saves its employees the hassle and distraction of separately handling the fee payment and promotes employees'

compliance with legal requirements. Accordingly, remittance through employer payroll withholding promotes the interest of employers.<sup>8</sup>

**H. The Circuit Court Appropriately Found that the Ordinance Does Not Require the Unlawful Disclosure of Employee Social Security Numbers.**

The ordinance does not authorize, much less require, the release of employees' Social Security numbers to private third parties.

In support of his argument, the Appellant mistakenly relies upon "the intent behind" 5 U.S.C. § 552(a) (cited generally by the Appellant as "§ 7 of the federal Privacy Act"). That section provides "It shall be unlawful for any Federal, State or local government to deny any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number." 5 U.S.C. § 552(a). The ordinance does not authorize such discrimination and Appellant points to no example of such discrimination based on the enactment or enforcement of the ordinance.

The Appellant also relies on 26 U.S.C. § 6103, but did not provide this Court or the City of Charleston with a precise citation. Frankly, Charleston is unsure why the Appellant stands on this statute as the code provision governs the confidentiality of information contained in federal income tax returns and when such a disclosure is allowed. The enforcement mechanism found at 26 U.S.C. § 7213(a) is similarly inapplicable as it only governs release of taxpayer data to third persons. The Charleston

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<sup>8</sup>Appellant Cooper is not an employer and therefore asks standing to raise this challenge as well as several others he pleads.

City Code neither allows or requires such disclosure. It simply requires employers to maintain taxpayer identification numbers for review in the event of an audit.

The Appellant further believes that the state companion code – West Virginia Code § 11-10-5d – bars the Charleston user fee. He is incorrect; § 11-10-5d(j) specifically authorizes municipalities to have access to tax return information. Additionally, § 11-10-5d(a) requires that the state tax commissioner maintain taxpayers' privacy in nearly the same manner as the federal statutes described above proscribe release of taxpayer data. Specifically, the Code states that:

[i]t shall be unlawful for any officer, employee, or agent of this state or of any county, municipality or governmental subdivision to divulge or make known in any manner the tax return, or any part thereof, of any person or disclose information concerning the personal affairs of any individual...

West Virginia Code § 11-10-5d. Thus, in the event that City officials were to conduct an inspection of employees' social security numbers, they would be precluded from disclosing those numbers to any third parties.

Further, even if the City's regulations or forms (some of which provide a space for social security numbers) are deemed as contravening these statutes, the City's current forms contain a privacy act statement that gives individuals the option of refusing to provide their Social Security Number and providing an alternative identification number instead. Thus, the issue is moot.

**I. The Circuit Court Appropriately Upheld the Ordinance as it is in Full Compliance with All Constitutional Requirements, Both Those in the West Virginia Constitution and in the United States Constitution.**

The Circuit Court appropriately upheld the ordinance because it is in full compliance with all State and Federal Constitutional requirements, including uniform taxation, equal protection, and due process. Appellant Cooper cites no cases whatsoever that support his assertion that the service fee violates constitutional provisions relating to uniform taxation, equal protection, and due process. Instead, Appellant Cooper essentially reiterates the same argument he propounded in previous sections of his brief that the user fee is not fair because it imposes a fee upon nonresidents of Charleston.

As is noted and discussed more fully above, “perfect equity is not the test.” Clay County Citizens, 192 W.Va. at 411, 452 S.E.2d at 727. This Court also noted in City of Huntington v. Bacon, that:

Charges for services provided by municipalities cannot always be equally achieved upon all users. This Court will uphold the fee if it is sufficiently related to the use of the special service for which the fee is imposed.

196 W.Va. at 469, 473 S.E.2d at 755.

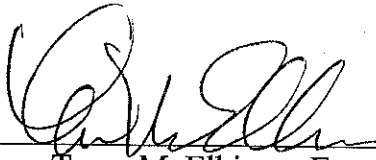
The service fee will finance 12.7% of the overall costs of police protection and street maintenance services provided by Charleston. An ordinance requiring individuals employed within the City, both residents and nonresidents, to finance just 12.7% of the total costs of police and street services is not unreasonable, is not unfair, and it is certainly not unconstitutional.

**V. CONCLUSION**

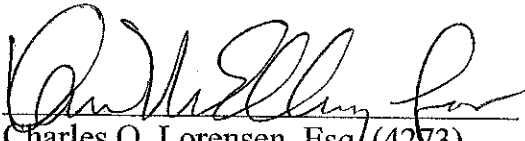
It is appropriate to deny Appellant Cooper his requested relief.<sup>9</sup> Applying the principle of *stare decisis*, this Court should find the procedural issues moot. Additionally, it is appropriate to reject Appellant Cooper's numerous substantive attacks because the ordinance reasonably serves the purpose for which it was enacted.

Respectfully submitted,

**CITY OF CHARLESTON**



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<sup>9</sup>Cooper is not entitled to the extraordinary relief he requests in his prayer for relief. Prospective relief with respect non-parties is not within the scope of relief available under the Declaratory Judgments Act. Further, Cooper does not represent the interests of any other payor of the fee.

APPEAL NO. 32612

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

THORNTON COOPER,

Appellant,

v.

CITY OF CHARLESTON,


Appellee.

CERTIFICATE OF SERVICE

I, Karen Tracy McElhinny, counsel for the City of Charleston, do hereby certify that I have served a true and exact copy of the foregoing "**Appellee's Brief**" on counsel record via the United States Postal Service by placing the same in a stamped envelope addressed as follows:

Thornton Cooper, Esq (WVSB # 823)  
3015 Ridgeview Drive  
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**Petitioner, Pro Se**

Dated this 13<sup>th</sup> day of June, 2005.

  
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Karen Tracy McElhinny, Esq. (WVSB #7517)