

APPEAL NO. 32612

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

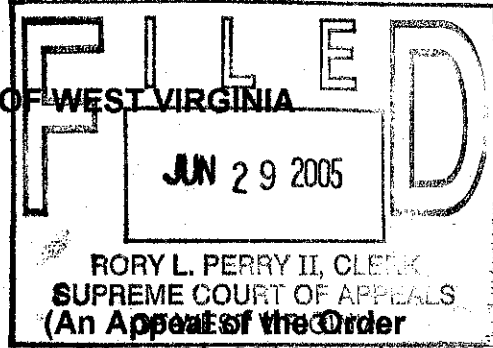
THORNTON COOPER,

Plaintiff Below, Appellant,

v.

CITY OF CHARLESTON,
a municipal corporation,

Defendant Below, Appellee.



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

APPELLANT'S REPLY BRIEF
SUBMITTED BY
THORNTON COOPER

THORNTON COOPER
Appellant

Pro Se

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

June 29, 2005

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.	ii
I. INTRODUCTION.	1
II. REPLY TO CITY'S STATEMENT OF FACTS.	2
III. REPLY TO RESPONSES TO ASSIGNMENTS OF ERROR.	9
IV. 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).	30
<u>City of Charleston v. Board of Education</u> , 158 W. Va. 141, 209 S.E.2d 55 (1974).	27
<u>City of Clarksburg v. Grandeotto, Inc.</u> , 204 W. Va. 404, 513 S.E.2d 177 (1998) (per curiam).	27
<u>City of Huntington v. Bacon</u> , 196 W. Va. 457, 473 S.E.2d 743 (1996).	27, 29-32, 37
<u>City of Huntington v. State Water Commission</u> , 137 W. Va. 786, 73 S.E.2d 833 (1999).	30
<u>City of Moundsville v. Steele</u> , 152 W. Va. 465, 164 S.E.2d 430 (1968).	27, 32
<u>City of Princeton v. Stamper</u> , 195 W. Va. 685, 466 S.E.2d 536 (1995).	27, 32
<u>Clay County Citizens for Fair Taxation v. Clay County Comm'n</u> , 192 W. Va. 408, 452 S.E.2d 724 (1996).	8, 27, 32
<u>Danyluk v. Bethlehem Steel Company</u> , 406 Pa. 427, 178 A.2d 609 (1962).	37
<u>Dean v. Town of Addison</u> , 207 W. Va. 538, 534 S.E.2d 403 (2000).	7, 27, 32
<u>Ellison v. City of Parkersburg</u> , 168 W. Va. 468, 284 S.E.2d 903 (1981).	27, 32
<u>Guernsey v. Borough of Midland</u> , 197 Pa. Super. 394, 178 A.2d 782 (1962).	37
<u>Kisner v. City of Fairmont</u> , 166 W. Va. 145, 272 S.E.2d 673 (1980).	39
<u>McCoy v. Sistersville</u> , 120 W. Va. 471, 199 S.E. 260 (1938).	27
<u>Miller v. Palmer</u> , 175 W. Va. 565, 336 S.E.2d 213 (1985).	16, 25
<u>Nine v. Grant Town</u> , 190 W. Va. 86, 437 S.E.2d 250 (1993).	10, 12, 30

Putnam County Fire Service Board v. Kelly, 192 W. Va. 37, 449 S.E.2d 508 (1964). 17, 18

Shobe v. Latimer, 162 W. Va. 779, 253 S.E.2d 54 (1979). 39

State ex rel. Plymale v. City of Huntington, 147 W. Va. 728, 131 S.E.2d 160 (1963). 24, 25

State ex rel. Riffle v. City of Clarksburg, 152 W. Va. 317, 162 S.E.2d 181 (1968). 25

United States v. State of Texas, 252 F. Supp. 234 (W. D. Tex. 1966), aff'd 384 U.S. 155, 86 S. Ct. 1383, 16 L. Ed. 2d 434 (1966). 34, 35

Velogol v. City of Weirton, 212 W. Va. 687, 575 S.E.2d 297 (2002). (per curiam). 25, 32

White v. Gosiene, 187 W. Va. 576, 420 S.E.2d 567 (1992). 26

CONSTITUTIONAL PROVISIONS:

U.S. Const. art. 1, s 9. 38

U.S. Const. amend. XXIV. 38

W. Va. Const. art. X, § 2 (repealed 1970). 33-35

Capitation Tax Repeal Amendment. 34

STATUTES:

W. Va. Code § 2-2-10(bb). 26

W. Va. Code § 7-15-17 (1975). 27

W. Va. Code § 7-17-12 (1984). 17, 18

W. Va. Code §§ 8-11-4(a). 9-12, 15, 19, 20, 22, 24

W. Va. Code § 8-11-4(a)(2). 11,12, 19

W. Va. Code § 8-11-4(a)(3). 20, 22

W. Va. Code § 8-13-3 (1969) (repealed 1971). 34-36

W. Va. Code § 8-13-13 (1971). 7, 10-12, 14-28, 31-33, 39-41

<u>W. Va. Code § 8-13-15.</u>41
<u>W. Va. Code § 8-13C-3 (2004).</u>41
<u>W. Va. Code § 11-7-1 (1933).</u>34
<u>W. Va. Code § 21-5-3.</u>39
CITY CHARTER OR CODE PROVISIONS:	
<u>Charleston City Charter § 89.</u>13, 19
<u>South Charleston City Code, Article 745.</u>8
OTHER AUTHORITY:	
<u>Willard Lorensen, "Rethinking the West Virginia Municipal Code of 1969."</u> 97 W. Va. L. Rev. 653 (1995).17, 25

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.

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

I. INTRODUCTION.

Thornton Cooper (Mr. Cooper), the Appellant herein and Plaintiff below, hereby submits his Reply Brief in the above-captioned appeal. This Reply Brief will address both the arguments raised in the Appellee's Brief (City's Brief), dated June 13, 2005, that was signed by Karen Tracy McElhinny, Esq., and Charles O. Lorensen, Esq., as Counsel for the City of Charleston, and the arguments raised in the Brief of the West Virginia Municipal League, Inc. (WVML), as amicus curiae, dated June 13, 2005, that was signed by Dennis R. Vaughan, Jr., Esq., and Charles O. Lorensen, Esq.

This case involves, in part, the legality of an ordinance adopted by the Appellee'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. 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 by Mr. Cooper.

On June 28, 2004, the Circuit Court issued a final order in which it ruled explicitly or implicitly against Mr. Cooper's positions on nearly all issues that he and the State Auditor had raised with respect to the validity of the ordinance(s) in question. The State Auditor 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.

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, Paragraph No. 21 of the first Joint Stipulation of Facts would be abbreviated as "JSF-21".

II. REPLY TO CITY'S STATEMENT OF FACTS.

Mr. Cooper hereby incorporates by reference herein the Statement of Facts set forth on pages 2-15 of the Initial Brief.

Contrary to the assertions on page 2 of the City's Brief, Mr. Cooper denies that his procedural challenges are "moot".

Also contrary to the assertions on page 2 of the City's Brief, Mr. Cooper is not requesting that this Honorable Court "disregard the Circuit Court's extensive findings". Since the twenty-six (26) Findings of Fact in the Circuit Court's order of June 28, 2004, are substantially derived from the stipulated evidentiary record, Mr. Cooper does not

ask this Honorable Court to disregard any of them. However, in its Findings of Fact, the Circuit Court omitted important portions of the stipulated evidentiary record that did not support the Conclusions of Law and ordering paragraphs of that order.

For example, Finding of Fact No. 8 in that order reads as follows:

8. Prior to the adoption of the User Fee Ordinance, the City caused a Class II legal advertisement to be published in the newspapers of general circulation in the Charleston area on August 28, 2003 and September 4, 2003. These advertisements contained the full text of proposed ordinance, Bill No. 7002.

What that finding of fact does not tell the reader is that the legal advertisements published on August 28, 2003, and September 4, 2003, told the public that the hearing on the proposed ordinance was to take place (or had already taken place) "on Tuesday, September 2, 2003, at 7:00 p.m., in the Council Chambers". (JSF-22; Joint Exhibit No. 10). The hearing did not take place on September 2, 2003. The hearing took place (without the publication of a revised legal advertisement) on September 13, 2003. That finding of fact also fails to inform the reader that the proposed ordinance, Bill No. 7002, was substantially amended by the City Council's passage of a very different committee substitute at the September 13, 2003, City Council meeting. That finding of fact also fails to inform the reader that the text of that very different committee substitute was never published prior to that September 13, 2003, City Council meeting. Furthermore, the important information omitted from Finding of Fact No. 8 was not contained in any of the other Findings of Fact in that order.

This is only one example of important stipulated evidence that was not included in the Findings of Fact in the order of June 28, 2004.

Also contrary to the assertions on page 2 of the City's Brief, Mr. Cooper did not "ignore the Circuit Court's extensive findings" in the Initial Brief. Most of the findings in the twenty-six (26) Findings of Fact are reflected in stipulated evidentiary record discussed in the Statement of Facts on pages 2-15 of the Initial Brief.

However, Mr. Cooper does agree, in part, with the last full paragraph on page 2 of the City's Brief:

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.

Mr. Cooper would correct that paragraph by saying that, as of August 2003, the City was not charging a separate fee for police protection and street maintenance services. It is possible that the City, at some point in its history, might have charged a separate fee or tax dedicated to paying for police protection or street maintenance. For example, prior to 1971, West Virginia cities were authorized to charge a municipal capitation tax (otherwise known as a "head tax" or "poll tax"), the proceeds of which were primarily dedicated to paying for street maintenance. That municipal capitation tax had a number of similarities to the "fee" in question. Whether the Appellee availed itself of this opportunity is not reflected in the stipulated evidentiary record.

The City's revenues from authorized taxes, without any one-dollar-per-head-per-week "fee", would appear to be adequate to pay for police protection and street maintenance. A legal advertisement published in the Charleston Daily Mail on March 28, 2005, indicates that, for fiscal year 2006, the two largest sources of revenue in Charleston's budget of over \$63,000,000 are municipal business and occupation taxes

in the amount of about \$32,500,000 and ad valorem taxes in the amount of about \$8,000,000. The "fee" in question is to raise about \$2,500,000.

Mr. Cooper does not challenge the findings described in the first paragraph of page 5 of the City's Brief, which are derived from Paragraphs 65-72 of the Joint Stipulation of Facts. Without editing by the City, these paragraphs read as follows:

65. The City of Charleston Police Department receives calls for assistance from its police department [sic] each year, some from residents of Charleston, some from non-residents, some from people who are employed within Charleston, some from people who are not employed within Charleston. The Charleston Police Department does not track the percentage of direct police intervention concerning people who are employed in the City of Charleston.

66. A percentage of the reported crime investigated by the City of Charleston Police Department is against nonresidents. In recent years, approximately 63% of reported crime victims lived in Charleston and approximately 37% of reported crime victims lived outside of Charleston.

67. Chief of Police Jerry Pauley submitted a letter dated September 2, 2003 to City Council stating that, in his experience in law enforcement, "resident and non-resident individuals who regularly work in Charleston are substantial, ongoing users of the Department's public safety services." A copy of Chief Pauley's letter is included as Joint Exhibit No. 30.

68. It is difficult to document the extent to which individuals employed within the City of Charleston use City streets. The City does not track which streets are regularly traveled by each individual who works in the City of Charleston. However, Don Carr, City Director of Public Works, submitted a letter dated September 2, 2003 stating that "resident and non-resident individuals who regularly work within Charleston are substantial, ongoing users of Charleston's streets, and this significant use fosters street maintenance services undertaken by the Public Works Department." See, Letter from Don Carr to David Molgaard dated September 2, 2003, included as Joint Exhibit No. 31.

69. There are individuals who reside in the City of Charleston, utilize city services, but do not work within the city.

70. There are individuals who work within the city but do not reside within the city.

71. There are individuals who neither reside in nor work in the City of Charleston but utilize some City services.

72. There are individuals who work and reside within the city.

[emphasis added, except as to word "See" in Paragraph No. 68.]

Mr. Cooper respectfully represents to this Honorable Court that nothing in Paragraphs Nos. 65-72 justifies the City's continuing failure to impose a "fee" for street maintenance and police protection upon thousands of City residents who are retired or who only work outside its corporate limits and that nothing in Paragraphs Nos. 65-72 justifies the City's imposition of such a "fee" on individuals (such as Mr. Cooper) who work within the City's corporate limits but live outside them.

There is no rational empirical basis for requiring the individuals (including Mr. Cooper) upon whom the "fee" is imposed to shoulder "12.7% of the overall cost of police protection and street maintenance services provided the City", to quote page 5 of the City's Brief.

Even as to the stipulated statistic that "approximately 37% of reported crime victims lived outside Charleston", there is no reasonable basis for assigning Mr. Cooper to the class of individuals who pay the "fee" in question. Many reported victims of crime in the City do not work there. Expenses for police services with respect to these reported crimes should not be imputed to Mr. Cooper. The figure of 37% includes everyone on Earth living outside the City who is a reported victim of crime within its corporate limits. Just because many unemployed or retired individuals living outside the City, and many individuals working and living outside its corporate limits, are reported victims of crimes within its corporate limits, Mr. Cooper should not be forced to pay a "fee" primarily because those reported crime victims live outside the City and do not

work there, while he also lives outside the City, but does work there, and is, therefore, trapped into involuntarily paying that "fee".

The factual situation in this case is distinguishable from that in Dean v. Town of Addison, 207 W. Va. 538, 534 S.E.2d 403 (2000). In that case, there was ample empirical evidence in the record that supported the imposition of a fire-protection fee on the owners and lessees of residential property in the municipality that imposed the fee, notwithstanding the fact that the fire-protection services were actually performed by a volunteer fire department that also provided services outside the municipality. To prevail in that case, the municipality had, and met, the burden of demonstrating that the amount of fees paid by the property owners in the municipality reasonably reflected the cost of protecting the municipality from fire.

There is no similar empirical evidence in the record in this case that would support the Appellee's position.

As Mr. Cooper stated on pages 3-6 of his Initial Brief, the Appellee could have passed a reasonable fee ordinance with respect to funding street maintenance and police protection, but chose not to do so.

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) 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 City of Charleston could have generated \$2,500,000 per year to fund street maintenance and police protection, 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. (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 could have imposed a new fee at the rate of \$7.68 per housing unit per month. $27,131 \times 12 \times \$7.68 = \$2,500,393$.

Instead, the Appellee passed an ordinance that is unsupported by West Virginia case law.

III. REPLY TO RESPONSES TO ASSIGNMENTS OF ERROR.

In responding to the legal arguments raised by the City and by the WVML, Mr. Cooper will generally use the same argument headings (A through M) that he used in the Initial Brief. These argument headings respectively correspond to the thirteen (13) assignments of error listed on pages 15 and 16 of the Initial Brief.

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, which was passed by the City Council on September 15, 2003, 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.

The Circuit Court failed to address the issues raised in these three causes of action and held that they were moot because the City Council passed a similar ordinance, designated Bill No. 7070, on June 7, 2004. However, Mr. Cooper is of the opinion that Bill No. 7070 is not valid and that it cannot be made retroactive.

IMPROPER PUBLICATION OF NOTICE.

Contrary to the assertions on page 12 of the City's Brief, the provisions of W. Va. Code § 8-11-4(a) do apply to publication of a proposed ordinance that would impose a

fee under the provisions of W. Va. Code § 8-13-13 (1971) and the provisions of W. Va. Code § 8-13-13 (1971) do apply to the publication on an adopted ordinance that would impose a fee under the provisions of W. Va. Code § 8-13-13(1971). The publication of the proposed fee ordinance is for one purpose: to allow interested citizens to have a voice in the matter and to influence the passage or defeat of that proposed ordinance. The publication of the adopted fee ordinance is for a very different purpose: to allow registered voters in the municipality that adopted the fee ordinance to attempt to nullify that adopted ordinance through signing petitions that would allow these registered voters to invoke the power of referendum.

A recent example of the power of referendum was the rejection, on June 25, 2005, by the voters of West Virginia of the proposed Pension Bond Amendment.

In Nine v. Grant Town, 190 W. Va. 86, 437 S.E.2d 250 (1993), by radically shortening the time that citizens could sign petitions after an ordinance was adopted, this Honorable Court did not follow prior precedent and inadvertently undermined the right of the voters to challenge adopted ordinances by signing petitions to invoke the power of referendum.

In an attempt to address a complicated set of preadoption and postadoption notice provisions, Mr. Cooper will devote the next nine (9) pages of this brief to discussing the following four (4) provisions in the context of this case: (I) the first paragraph of W. Va. Code § 8-11-4(a); (II) the third paragraph of W. Va. Code § 8-11-4(a); (III) the City's charter provision with respect to initiatives; and (IV) the notice provisions set forth in W. Va. Code § 8-13-13 (1971).

(I) The first paragraph of W. Va. Code §8-11-4(a) was enacted primarily to liberate municipalities from having to comply with many newspaper publication requirements, as to proposed ordinances and as to adopted ordinances, that were set forth in municipal charters that were in effect as of July 1, 1969. That paragraph reads as follows:

(a) Notwithstanding any charter provision to the contrary, which charter provision was in effect on the effective date of this section [July 1, 1969], it shall not be necessary, except where otherwise provided in this code, for the governing body of any municipality to publish in a newspaper any proposed ordinance prior to the adoption thereof or any enacted ordinance subsequent to the adoption thereof, and any and all ordinances of every municipality shall be adopted in accordance with the following requirements, except 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.

[emphasis added]

Although the foregoing paragraph establishes a general rule that neither preadoption publication of notice of a proposed ordinance nor postadoption publication of notice of an enacted ordinance is necessary, two (2) additional publication requirements relevant to this case are "otherwise provided in this code". One of those additional publication requirements, relating to preadoption notice of proposed ordinances involving the raising of revenue, is set forth in the third paragraph of W. Va. Code § 8-11-4(a). The other publication requirement, relating to postadoption notice for enacted fee ordinances under W. Va. Code § 8-13-13 (1971), is set forth in W. Va. Code § 8-13-13 (1971) itself.

(II) The third paragraph of W. Va. Code § 8-11-4(a) is W. Va. Code § 8-11-4(a)(2). W. Va. Code § 8-11-4(a)(2) establishes the following preadoption notice

requirements (among others) for proposed ordinances that would increase either municipal fees or municipal 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 as a Class 1-O legal advertisement . . . The notice shall state the . . . date, time and place of the final vote on adoption. . .

[emphasis added]

Because fees imposed pursuant to W. Va. Code § 8-13-13 (1971) are obviously a source of "revenue for the municipality", the preadoption notice requirements set forth in W. Va. Code § 8-11-4(a)(2) clearly apply to proposed ordinances that would impose fees pursuant to W. Va. Code § 8-13-13 (1971). Any language in Nine v. Grant Town, supra, to the contrary should be overruled.

In violation of these preadoption notice requirements, the City's 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)

(III) Many municipal charters, such as those of the Cities of Charleston and South Charleston, contain provisions with respect to initiative, referendum, and recall. Charter provisions authorizing the power of initiative often permit voters to nullify an ordinance previously adopted by a city council by allowing that city's voters to pass an initiated ordinance that repeals that city council's ordinance. Most tax or fee ordinances

authorized in Chapter 8 of the West Virginia Code are subject to such initiatives in the municipalities that have charter provisions authorizing such initiatives.

For example, the first paragraph of § 89 of the Charleston City Charter reads as follows:

Section 89. Initiation of ordinances by voters.

Any proposed ordinance, or amendment to any ordinance already in effect, may be submitted to the city council by the petition of qualified voters in said city, but such petition must be signed by such number of voters as shall amount to at least ten percent of the number of votes cast for the office of mayor at the last preceding municipal election. Such proposed ordinance, or amendment to an ordinance, shall be passed without alteration or change by the city council within thirty days after such petition is filed, or the city council shall, in lieu of passing such ordinance or amendment to an ordinance, submit such proposed ordinance, or amendment to an ordinance, in the manner hereinafter prescribed for ratification or rejection to the qualified voters of the city at the next regular municipal election that is to be held not less than sixty days after such petition is filed. If such petition contains a request for a special election and is signed by sufficient qualified voters to equal in number at least fifteen percent of the votes so cast for the office of mayor at the last preceding regular municipal election, the ordinance or amendment thereby proposed shall be passed by the city council without amendment or change, within thirty days after such petition is filed, or the city council shall submit such proposed ordinance or amendment for ratification or rejection to the qualified voters at a special election which shall be called within thirty days and held not less than sixty nor more than ninety days after such petition is filed, unless a general or special election is fixed by law to be held within said period of time. In the latter event, such proposed ordinance or amendment shall be submitted for ratification or rejection at such election. The city council shall cause such proposed ordinance or amendment to be printed or published in some newspaper of general circulation in the city once each week from the time the council decides to submit the same to the voters until such election is held. No ordinance or amendment to an ordinance adopted by the voters shall be repealed or amended by the city council.

[emphasis added]

Therefore, to nullify most ordinances passed by the City Council of the City of Charleston that impose or increase taxes or fees, the registered (qualified) voters of that municipality have a remedy. Let us assume that the City has 30,000 registered voters

and that forty percent (40%) of them voted for the office of mayor in the last regular municipal election. That would be equal to 12,000 voters. Under the foregoing provision, an initiative petition signed by 1,200 registered voters -- ten percent (10%) of those 12,000 registered voters who voted for the office of mayor in the last regular election -- would be enough to place an initiative to repeal the tax or fee ordinance on the next regular election ballot unless the City Council adopts the repealing ordinance. The initiative petition could be filed months or years after the original tax or fee ordinance was adopted. Furthermore, an initiative petition signed by 1,800 registered voters would be enough to place an initiative to repeal the tax or fee ordinance on a special election ballot unless the City Council adopts the repealing ordinance.

On the other hand, the voters in a West Virginia municipality that lacks such an initiative provision have little recourse other than to elect new council members who promise to repeal the offending tax or fee ordinance.

Under this Honorable Court's interpretation of W. Va. Code § 8-13-13 (1971), however, the provisions of municipal charters that permit such initiatives have no force and effect with respect to fee ordinances passed under the color of that section. The referendum provisions set forth in that section apply without regard to whether a municipality has, or does not have, charter provisions that authorize initiative, referendum, and/or recall.

(IV) 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]

Clearly the term "ordinance enacted or substantially amended" applies to an adopted ordinance and not to a proposed ordinance. This Honorable Court should also note that the "notwithstanding" language applies to the provisions of the first paragraph of W. Va. Code § 8-11-4(a), and not to the provisions of the third paragraph of W. Va. Code § 8-11-4(a). That is to say, the Legislature was clearly stating that the publication of postadoption notice as to an enacted fee ordinance under W. Va. Code § 8-13-13 (1971) is an exception to the general language in the first paragraph of W. Va. Code § 8-11-4(a) that states that neither preadoption or postadoption publication is required. The word "notwithstanding" does not relate to the language in the third paragraph of W. Va. Code § 8-11-4(a) that pertains to preadoption notice of proposed ordinances relating to revenue.

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]

The last sentence quoted above makes it absolutely clear that publication of an adopted ordinance (not a "proposed" ordinance) is to be made after it is adopted or substantially amended: "Voting" (by the qualified voters of the municipality) "thereon" (on the ordinance that has been adopted) "shall not take place until after notice of such submission" (to the voters of the adopted ordinance in a regular or special municipal election) "has been given by publication as above provided" (i.e., as provided in the earlier quoted sentence that begins with the word "Notwithstanding") "for the publication of the ordinance after it is adopted or substantially amended". (emphasis added) That sentence removes all doubt that the publication required by this section must be after adoption, not before adoption.

In the case of Miller v. Palmer, 175 W. Va. 565, 356 S.E.2d 213 (1985), this Honorable Court addressed the validity of a petition to place on the ballot of the next municipal election an initiative that challenged a fire-service-fee ordinance that had been passed by the City Council of the City of Wheeling on August 30, 1983. In ruling against the initiative petition, the Court held that W. Va. Code § 8-13-13 (1971), "which provides for the enactment of the fee ordinances also provides detailed provisions governing how qualified voters may challenge these enactments. Because these challenge provisions are general law, they supercede and displace any challenge mechanism that a city charter may provide." Id., 356 S.E.2d at 217. 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)

The late Willard Lorensen, Dean of the West Virginia University College of Law, also addressed this issue a decade ago in W. Lorensen, "Rethinking the West Virginia Municipal Code of 1969." 97 W. Va. L. Rev. 653, 673, n. 67 (1995). Footnote 67 to that article is completely consistent with Mr. Cooper's position that publication should be made right after the adoption of a "fee" ordinance:

A publication requirement, included in the basic fee-enabling statute does extend the time for gathering protest petitioners. The statute designates a fifteen-day time limit for the filing of the petition of protest, but the time limitation runs from the time after the publication of the ordinance imposing the fee. There is now explicit reference back to W. VA CODE § 59-3-1 (1994). A class II legal advertisement must run one a week for two weeks, and W. VA. CODE § 59-3-2(3) (1994) states that "once a week for two weeks" means two times within fourteen days with at least six days between the first and second publication. If citizens opposed to the fees kept close watch on council actions, the time available to collect petition signatures would extend for almost a month following the adoption of such an ordinance. [emphasis added] Id.

Another case in support of Mr. Cooper's position that W. Va. Code § 8-13-13 requires postadoption notice is Putnam County Fire Service Board v. Kelly, 192 W. Va. 37, 449 S.E.2d 508 (1994). That case involved an unsuccessful challenge to the constitutionality of W. Va. Code § 7-17-12 (1984), a statute modeled on W. Va. Code § 8-13-13 (1971) that authorized county commissions to enact ordinances imposing fire service fees and contained referendum provisions similar to those in the latter statute. This case involved a fire-service-fee ordinance enacted by the County Commission of Putnam County. In that case, this Court discussed the adoption and referendum procedure as follows:

On November 4, 1985, the Commission adopted the ordinance in final form. The effective date of the ordinance was January 1, 1986.

On November 7 and November 14, 1985, the text of the ordinance adopted by the Commission was published in the Charleston Gazette and Charleston Daily Mail in accordance with West Virginia Code § 7-17-12. During the fifteen days following November 14, 1985, persons seeking a public vote on the fire service fee ordinance gathered 6,577 signatures on a petition and submitted said petition to the clerk of the Commission.

On December 2, 1985, the clerk of the Commission presented the petition seeking ballot access to the Commission and requested an order from the Commission directing him to verify the signatures. On February 6, 1986, the Commission was informed by the County Administrator that, while a total of 6,577 signatures appeared on the petition, only 4,932 were qualified voters, which was 482 signatures short of the amount required to put the fee issue on the ballot.

West Virginia Code § 7-17-12 and the language of West Virginia Code § 8-13-13 pertaining to fire service fees are virtually identical. Both statutes require a petition containing signatures from thirty percent of the qualified voters in opposition to a fire service fee ordinance in order to gain ballot access as well as mandate that the petition in opposition to said ordinance be filed with respective governing bodies within fifteen days after the publication of the fire service fee ordinance.

[emphasis added] Id., 449 S.E.2d at 510, 511.

Hence, assuming arguendo that Committee Substitute for Bill No. 7002 was valid when it was adopted on Monday, September 15, 2003, the City of Charleston should have caused to be published the full text of the adopted ordinance, not the proposed ordinance, "once a week for two consecutive weeks" in a Charleston newspaper. Let us assume that the date of first publication would have been Thursday, September 18, 2003, and that the date of second day of publication would have been Thursday, September 25, 2003. Fifteen (15) days after September 25, 2003, would have fallen on Friday, October 10, 2003.

By Friday, October 10, 2003, under this scenario, petitions bearing the signatures of thirty percent (30%) of the City's registered voters would have had to have been filed with the City Clerk's Office to trigger a referendum on Committee Substitute for Bill No, 7002. Assuming that the City has 30,000 registered voters, this requirement would have meant that petitions with 9,000 signatures of registered voters would have had to have been filed with the City Clerk's Office by Friday, October 10, 2003, to trigger such a referendum. This is obviously a much higher threshold than the 1,200 signatures, with no deadline, needed to trigger an initiative election under § 89 of the Charleston City Charter.

Unfortunately, the second publication of the proposed ordinance (Bill No. 7002) was made on Thursday, September 4, 2003. Therefore, under the City's theory, Charleston residents opposing the adopted ordinance would have had only until Friday, September 19, 2003, to file petitions with the names of about 9,000 registered voters. That deadline was only four (4) days after the committee substitute was passed on Monday, September 15, 2003!

Mr. Cooper is of the opinion that this discussion addresses most of the issues raised on pages 12 and 13 of the City's Brief. The City is repeatedly mistaken in its interpretation of the law. The preadoption notice (which did not need to include the full text of the proposed ordinance) should have been published as a Class I-O legal advertisement. The postadoption notice (which did need to include the full text of the adopted ordinance) should have been published as a Class II legal advertisement.

One of the many errors in the City's Brief is set forth in the second paragraph of page 13 thereof. The City simply does not comprehend that the term "any ordinance

enacted or substantially amended" in W. Va. Code § 8-13-13 (1971) does not mean "any proposed ordinance enacted or substantially amended." The term "ordinance" refers to the bill finally passed by the City Council, not the bill proposed by the City Council. For an ordinance to be substantially amended, the City Council first has to enact one ordinance, which is normally effective for months or years. Then the City Council has to enact a second ordinance that modifies the earlier adopted ordinance.

An example of the substantial amendment of an ordinance was the amendment, on March 24, 2003, by the City of Huntington, of its original "fee" ordinance of June 14, 2002, to increase the "fee" in that municipality from \$1.00 per calendar week to \$2.00 per calendar week. The requirements as to the publication of "any ordinance enacted or substantially amended" mean that the City of Huntington should have provided postadoption notice both of the June 14, 2002, ordinance and of the March 24, 2003, ordinance.

The "substantial amendment" language in W. Va. Code § 8-13-13 (1971) has nothing to do with the substantial changes that the City Council made on September 15, 2003, to the original version of Bill No. 7002. The substantial amendment language applies only to substantial changes made by one enacted ordinance to a previously enacted ordinance, not to changes in a bill (which is only a proposed ordinance).

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

Nevertheless, the City, on page 13 of its Brief, claims that the Finance Committee's changes to the original version of Bill No. 7002 were only "minor". Therefore, Mr. Cooper will discuss those changes in even more detail.

The original version of Bill No. 7002 was introduced on August 18, 2003, by Councilman Edward Talkington. Mr. Cooper will refer to this original version of Bill No. 7002 as Mr. Talkington's bill. A copy of that original bill is included in the joint exhibits as Joint Exhibit No. 9. On Monday afternoon, September 15, 2003, the City's Finance Committee substantially amended Mr. Talkington's bill. The committee report and resulting marked-up bill, with additions and strikethroughs involving over 100 lines, is included as Joint Exhibit No. 12. Committee Substitute for Bill No. 7002, as adopted by the City Council on the evening of Monday, September 15, 2003, is included as Joint Exhibit No. 13. A review of these joint exhibits demonstrates the following:

One change by the Finance Committee was to expand the scope of the original bill to include employed individuals who were not covered in Mr. Talkington's bill. For example, in his bill, an individual, on the payroll of an employer, who worked within the corporate limits of the City of Charleston, either on a full-time or a part-time basis, between one (1) day and twenty-nine (29) days, both inclusive, during a calendar year, and was not self-employed, did not have to pay the "fee" that Mr. Talkington's bill had imposed. In the committee substitute, however, this exception was eliminated, as lines 76 and 77 of the marked-up version reflect.

Another change by the Finance Committee was to include self-employed workers who were not covered in Mr. Talkington's bill. For example, in his bill, a self-employed worker, who had an office or place of business within the corporate limits of the City of

Charleston, and conducted business there, either on a full-time or part-time basis, between one (1) and twenty-nine (29) days, both inclusive, during a calendar year, and was not employed by an employer, did not have to pay the "fee" that Mr. Talkington's bill had imposed. In the committee substitute, however, this exception was eliminated -- if that worker regularly maintains such an office during any four (4) calendar weeks of the year -- as lines 112-115 of the marked-up version reflect.

A third change made by the Finance Committee was to expand the scope of "employee" to add those individuals who "reported to" one or more locations within the corporate limits of the City of Charleston to the original group of individuals who were "employed at" one or more of those locations. This change is reflected on lines 74 and 75 of the marked-up version. This change eliminated any doubt that the members of the West Virginia Legislature were to be included within the ambit of the legislation, as so amended.

A fourth change made by the Finance Committee, as lines 209-224 of the marked-up version reflect, was the elimination of a provision in Mr. Talkington's bill that created a lien on the real and personal property of any individual upon whom the "fee" was imposed. That lien provision was in clear violation of one of the sentences in W. Va. Code § 8-13-13 (1971).

The final adoption, by the City Council, of Committee Substitute for Bill No. 7002, on Monday, September 15, 2003, at the same meeting at which the original Bill No. 7002 was materially amended by inserting the committee substitute in lieu thereof, was clearly in violation of § 8-11-4(a)(3) of the West Virginia Code.

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.

On pages 9 and 10 of its Brief, the City takes the position that Bill No. 7070 is now in effect.

Assuming arguendo that Bill No. 7070 was valid when it was adopted on Monday, June 7, 2004, the City should have caused to be published the full text of the adopted ordinance once a week for two consecutive weeks in a Charleston newspaper. Let us assume that the date of first publication was Thursday, June 10, 2004, and that the date of second publication was Thursday, June 17, 2004. Fifteen (15) days after June 17, 2004, would have fallen on Friday, July 2, 2004.

By Friday, July 2, 2004, under this scenario, petitions bearing the signatures of thirty percent (30%) of the City's registered voters would have had to have been filed with the City Clerk's Office to trigger a referendum on Bill No. 7070. Assuming that the City has 30,000 registered voters, this requirement would have meant that petitions with 9,000 signatures of registered voters would have had to have been filed by Friday, July 2, 2004, to trigger a referendum on Bill No. 7070.

Finding of Fact No. 24 on page 5 of the Circuit Court's order of June 28, 2004, reads as follows:

24. The City of Charleston caused to be published in newspapers of general circulation in the Charleston, West Virginia area, a legal notice on Friday, May 28, 2004 containing the same information that appeared in its legal notice on May 21, 2004.

Unfortunately, since the second publication of notice was on Friday, May 28, 2004, under the City's theory, Charleston residents opposing the Bill No. 7070, as adopted, would have had only until Monday, June 14, 2004, to file petitions with the

names of about 9,000 registered voters. That deadline was only one (1) week after the City Council adopted Bill No. 7070 on Monday, June 7, 2004!

This Honorable Court should note that the individual who prepares a legal notice has no crystal ball to determine whether a municipal council will reject a proposed ordinance, amend it, or adopt it in its original form. For referendum purposes, it is obviously premature for any notice to be issued about a proposed ordinance.

In State ex rel. Plymale v City of Huntington, 147 W. Va. 728, 131 S.E.2d 160 (1963), this Court made it clear that the Legislature did not intend that a fee ordinance go into effect and then be repealed by the voters:

. . . The fees to be collected under these ordinances, though not taxes, are nonetheless a part of the revenues upon which the city bases its fiscal affairs. The legislature obviously intended to give voters an opportunity to defeat the action of council by means of a referendum, but did not intend to provide a means to repeal the action of council after the fees became effective and the anticipated revenues therefrom were included in its budget and, in fact, approved by the State Tax Commissioner. To permit the repeal of a revenue measure so adopted and made effective would invite a state of chaos, insofar as the fiscal affairs of a municipality are concerned. [id., 131 S.E.2d at 164]

If a fee ordinance may not be repealed, in effect, by the voters after that ordinance becomes effective, then that ordinance may not lawfully take effect on or before the proper deadline for the filing of petitions for signatures with the municipal clerk's office. Otherwise, the ordinance might go into effect and then go out of effect if petitions with enough signatures were filed by that deadline.

Because the City provided no postadoption notice with respect to Bill No. 7070 after it was adopted on June 7, 2004, this Honorable Court should hold 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, supra; State ex rel. Riffle v. City of Clarksburg, 152 W. Va. 317, 162 S.E.2d 181 (1968); Miller v. Palmer, supra; Willard Lorenson, "Rethinking the West Virginia Municipal Code of 1969," 97 W. Va. L. Rev. 653, 668-677, and 673, n. 67 (1995).

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.

On pages 9-11 of its Brief, the City cites Velogol v. City of Weirton, 212 W. Va. 687, 575 S.E.2d 297 (2002) (per curiam). Syllabus Point 1 of that opinion stated that courts will not ordinarily decide a moot question.

Mr. Cooper acknowledges that this Court indicated, in Footnote 3 of Velogol that retroactivity may be appropriate in some municipal ordinances. Nevertheless, he continues to be of the opinion that this Court should hold that the provisions of Bill No. 7070 are invalid insofar as they purport to be retroactive for the following reasons:

(1) For the reasons set forth in the previous discussion about publication of notice, Mr. Cooper is of the opinion that Bill No. 7070 is not properly in effect.

(2) Mr. Cooper submits that it was unreasonable under W. Va. Code § 8-13-13 (1971) for the City to adopt an ordinance in June of 2004 imposing a "fee" that was retroactive to January 1, 2004, upon tens of thousands of individuals who work within the corporate limits of the City of Charleston.

(3) 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 place their signatures

on petitions filed with the municipal clerk 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.

(4) Mr. Cooper's objections are not based upon federal constitutional grounds. Therefore, the federal cases cited on page 11 of the City's Brief and in Footnote 3 of Velogol are not relevant to his argument. The mere fact that an activity may not violate federal constitutional provisions does not mean that that activity is legal or proper.

(5) "A statute is presumed to operate prospectively unless the intent that it shall operate retroactively is clearly expressed by its terms or is necessarily implied from the language of the statute." Syllabus Point 3, White v. Gosiene, 187 W. Va. 576, 420 S.E.2d 567 (1992). Likewise, under W. Va. Code § 2-2-10(bb), a "statute is presumed to be prospective in its operation unless expressly made retrospective". There is nothing in the language of W. Va. Code § 8-13-13 (1971) that suggests that the West Virginia Legislature intended to authorize municipalities to impose retroactive fees under that statutory section.

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.

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". 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, 120 W. Va. 471, 199 S.E. 260 (1938); (2) City of Moundsville v. Steele, 152 W. Va. 465, 164 S.E.2d 430 (1968); (3) City of Charleston v. Board of Education, 158 W. Va. 141, 209 S.E.2d 55 (1974); (4) Ellison v. City of Parkersburg, 168 W. Va. 468, 284 S.E.2d 903 (1981); (5) City of Princeton v. Stamper, 195 W. Va. 685, 466 S.E.2d 536 (1995); (6) City of Huntington v. Bacon, 196 W. Va. 457, 473 S.E.2d 743 (1996); (7) City of Clarksburg v. Grandeotto, Inc., 204 W. Va. 404, 513 S.E.2d 177 (1998) (per curiam); and (8) Dean v. Town of Addison, 207 W. Va. 538, 534 S.E.2d 403 (2000). 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 Appellee, on pages 14-19 of its Brief, attempts to avoid the fact that in each of these cases, the "fee" in question was always imposed upon either a resident of the municipality imposing the fee or upon the owner or lessee of real estate in that municipality. One comment, on page 17 of the City's Brief, defies both logic and experience:

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 life and the preservation of order, whereas the services at issue in the cases cited by the Appellant (fire/flood protection and the disposal of waste) are largely related to the protection of real property.

Since when is street maintenance considered "personal in nature" or "directed at the protection of life and the preservation of order"? Since when is fire protection not considered "personal in nature" or "directed at the protection of life"? Does the City believe that hundreds of firefighters were attempting to protect real estate when they perished at the World Trade Center?

In any event, Mr. Cooper cited the eight (8) cases in question because, to the best of his knowledge, they are the only cases in which this Court has upheld fees imposed pursuant to W. Va. Code § 8-13-13 (1971). The City did not cite any other such cases.

A rather amusing statement is the suggestion, on page 14 of the City's Brief, that being compelled to pay the one-dollar-per-head-per-week user fee is somehow equivalent to choosing to pay for using a municipal parking lot:

. . . 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. . .

When Mr. Cooper uses the term "impose a fee" in this case, he is talking about requiring a person upon whom the fee was imposed to pay the fee in question, against the will of that person. The term "impose a fee" does not relate to situations in which individuals voluntarily pay to use parking lots or recreational facilities operated by a municipality. It should have been obvious to the City that Mr. Cooper is not challenging the Appellee's right to charge South Charlestonians who voluntarily use its parking lots.

Contrary to the assertions on page 18 of the City's Brief, Mr. Cooper submits that the actual reason that the City imposed the "fee" is that many, and probably most, of the individuals upon whom that "fee" is imposed are not Charlestonians. The City wants to compel such non-Charlestonians to cross-subsidize the City's services. It is clear that the City wants non-Charlestonians to cross-subsidize police-protection services that flow to Charlestonians. For example, at the City Council meeting on September 15, 2003, at which Committee Substitute for Bill No. 7002 was adopted, Councilman Weintraub explained why he was going to vote for that bill:

Your Honor. I prefer to deal with things in the here and now, and I prefer to deal with reality, rather than perception, and that is [why] I speak in strong favor of the user fee. Shortly after this [year's] elections I met with a number of residents, approximately 30, who live in the Piedmont Road area, I met with them for two hours. . . . I'm concerned about the residents of Piedmont Road, I'm concerned about the residents of the East End, I'm concerned about the reality that we only have two police officers working on street crimes now. That is unacceptable for a size, for a city of our size, it is unacceptable for a city that is trying to do the things that we are trying to do. [Joint Exhibit No. 36, transcript of September 15, 2003, City Council meeting, at p. 10]

On the other hand, Mr. Cooper believes that any increased police protection in the City of Charleston should be funded by the primary recipients of this police protection: the residents of the City of Charleston.

In City of Huntington v. Bacon, *supra*, this Court made the following comment:

We have made the above holdings with reservations. This Court has previously recognized "the financial plight of municipalities and the continuing need to generate revenue." . . . However, our approval today as to the imposition of the fee on the Bacons and the Board of Education should not open the "floodgates" to creative financing so that a municipality fees a citizen to death. . . [Id., 473 S.E.2d at 757]

If it affirms the order of June 28, 2004, this Court will be opening the floodgates for dozens of municipalities to engage in such creative financing. Indeed, the first page of the Brief by the WVML recites that organization has "approximately 200 member municipalities". On pages 2-5 of that Brief, the WVML offers municipal-power arguments that run counter to precedent. A municipality is a political subdivision of the state and is a mere creature of the Legislature. City of Huntington v. State Water Commission, 137 W. Va. 786, 73 S.E.2d 833 (1953). 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. Calabrese v. City of Charleston, 204 W. Va. 651, 515 S.E.2d 814 (1999).

Mr. Cooper requests that this Court reject the arguments made by the City and the WVML and adhere to that portion of Nine v. Grant Town, supra, 437 S.E.2d at 253, in which the 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]

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.

On pages 20 and 21 of its Brief, the City cited five (5) cases in support of its proposition that Mr. Cooper had not met his burden of proving the "fee" ordinances are clearly unreasonable. In each of those cases, this Honorable Court upheld fees that were imposed upon residents of, or owners or lessees of real estate located within, the municipality (or county) that imposed the fee. Those cases support Mr. Cooper's arguments that the appropriate type of fee for the City to impose to finance street maintenance and police protection would be a per-household fee imposed upon the owners or lessees of the City's 27,131 housing units.

One of the tests in Huntington v. Bacon, supra, is to determine whether a fee reasonably serves its purpose. In that case, the Court stated that "common sense dictates that owners of property benefit most" from a municipality's fire and flood protection services. Id., 473 S.E.2d at 755. Likewise, "common sense", as well as the stipulated record in this case, demonstrates that the primary beneficiaries of the City's

police and street-maintenance services are the residents of the City and the owners or lessees of real estate located within its corporate limits.

Indeed, in Velogol v. City of Weirton, supra, this Court stated that the City of Weirton's challenged 2000 fee ordinance -- which imposed a fire and police service fee upon residents of, and property owners in, that municipality -- was "similar" to the fee ordinances upheld in Dean v. Town of Addison, supra, in Huntington v. Bacon, supra, in City of Princeton v. Stamper, supra, and in Ellison v. City of Parkersburg, supra.

Likewise, in City of Moundsville v. Steele, supra, this Court upheld a 1959 fee ordinance in which the City of Moundville imposed a fee per front foot for street maintenance, etc., upon the occupiers of improved premises abutting the streets and avenues in that municipality.

Accordingly, to the extent that those Weirton and Moundsville fee ordinances are reasonable, the City of Charleston's "fee" ordinances must, therefore, be unreasonable.

You can't have it both ways!

In Clay County Citizens for Fair Taxation v. Clay County Commission, supra, 452

S.E.2d at 727, this Court stated:

. . . Given the administrative difficulties of collecting the fee on any basis other than a per household basis, we find that the fee imposed is sufficiently related to the use of the special service for which the fee is imposed that the scheme survives constitutional challenge. An emergency ambulance service fee that taxes each household regardless of the number of members \$25 a year to support ambulance services succeeds in tying the burden of the fee to the usage of the service in a sufficiently reasonable way to satisfy the requirements of W. Va. Code 7-15-17 (1975) and it is valid, lawful and enforceable under W. Va. Code 7-15-17 (1975).

[emphasis added]

It is undisputed that the "fee" imposed by the City of Charleston could have been imposed instead on a per-household basis. The City already sends out bills to the owner or lessee of each housing unit located within its corporate limits for fire, sewage, and solid waste services on a monthly basis. (JSF-15; Joint Exhibit No. 4). Hence, the City of Charleston decided to impose the "fee" upon individuals who neither reside within, not own or lease real estate within, its corporate limits for political expediency, not for administrative expediency.

Therefore, any municipal ordinance that fails to impose the "fee" in question on each household in the City, while imposing the "fee" on tens of thousands of individuals who neither reside within, nor own or lease real estate within, its corporate limits, does not reasonably serve the purpose of the "fee". On pages 5-9 of this Brief, Mr. Cooper has discussed the fact that the information in the stipulated evidentiary record does not demonstrate that the "fees" imposed upon non-Charlestonians reasonably reflect the cost of providing police-protection and street-maintenance services to those non-Charlestonians.

Mr. Cooper clearly has met his burden in demonstrating that the City's "fee" ordinances are clearly unreasonable, as well as being inequitable and imprudent.

Accordingly, Mr. Cooper respectfully requests that this Honorable Court 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)

Capitation taxes are also known as "head taxes" and "poll taxes". The Latin word for "head" is "caput". The word "poll" is derived from a Middle English word for "head" or "top of head". In United States v. State of Texas, 252 F. Supp. 234, 238 (W. D. Tex. 1966), aff'd 384 U.S. 155, 86 S. Ct. 1383, 16 L. Ed. 2d 434 (1966), the District Court stated:

Although frequently thought of as a tax on the privilege of voting, the poll tax is actually a head tax. In this context, "poll" means "head" rather than the term customarily used to describe a place of voting. . .

In 1970, West Virginia legislators decided to abolish all capitation taxes. Such taxes are very regressive. 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)

As a result of the 1970 constitutional amendment and the 1971 bill repealing the state and municipal capitation taxes, it is illegal for any municipality to charge a head tax or capitation tax, no matter how it is labeled. Such capitation taxes are illegal even though they may be "uniform taxes" in nature. Capitation taxes are no longer on the table as a source of revenue, even if they are "uniform".

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 City'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.

The City's Brief does not even discuss the municipal capitation tax that was repealed in 1971. However, the WVML's Brief mentions the repealed municipal capitation tax but asserts that the former municipal capitation tax was restricted by age and residency. The WVML misses the point. What makes a tax a capitation tax is the fact that it is imposed on a per-head basis. The fact that a per-head tax is imposed without age and/or residency restrictions, or above a certain dollar cap, does not make that tax legal and does not keep it from being a capitation tax. See, e.g., Danyluk v. Bethlehem Steel Company, 406 Pa. 427, 178 A.2d 609 (1962); Guernsey v. Borough of Midland, 197 Pa. Super. 394, 178 A.2d 782 (1962).

Another argument is that dedicating most of all of the proceeds from an involuntary per-head charge makes that charge a "fee". Since the proceeds from the repealed state capitation tax were dedicated to the "support of free schools" and the proceeds of the repealed municipal capitation tax were dedicated primarily to street maintenance, the City and the WVML appear to believe that West Virginia never had any state or municipal capitation taxes in the first place.

Mr. Cooper disagrees. If these involuntary per-head charges were called capitation taxes until 1971, any involuntary per-head charges after 1971, whether or not

the proceeds from those per-head charges are dedicated for a specific purpose, are capitation taxes. Indeed, a reference to capitation taxes is made in Article I, § 9, of the United States Constitution. Furthermore, there is a reference to poll taxes in the Twenty-Fourth Amendment. If involuntary per-head charges were or are considered capitation taxes in the federal and state constitutions, and have been for over two (2) centuries, this Honorable Court should not embrace any fiction that recharacterizes these involuntary per-head charges as "user fees".

This Honorable Court should declare the ordinances in question to be null and void as imposing an unlawful tax.

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.

Mr. Cooper stands on the arguments that he made on pages 37 and 38 of his Initial Brief.

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.

Mr. Cooper stands on the arguments that he made on page 38 of his Initial Brief.

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.

On pages 26 and 27 of its Brief, the City defends its conduct and challenges Mr. Cooper's standing to make this and other challenges.

In the first place, for standing in declaratory-judgment proceedings, it is not essential that a party have a personal legal right or interest. See, Shobe v. Latimer, 162 W. Va. 779, 253 S.E.2d 54 (1979); Kisner v. City of Fairmont, 166 W. Va. 145, 272 S.E.2d 673 (1980). In the second place, Mr. Cooper clearly has a personal legal interest in not having money withheld from his pay.

The basis for the City's argument appears to be the language in W. Va. Code § 8-13-13 (1971) authorizes a municipality "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)

Mr. Cooper submits that the Legislature clearly did not intend the term "collected" to mean "remitted by employers through mandatory withholding." Instead, the Legislature intended to give municipalities leeway in deciding whether to mail a bill to a customer every month, every two months, every quarter, or every year, whether to bill before or after service is rendered, and whether or not to combine several different fees on the same bill.

Furthermore, an employer traditionally withholds taxes, not user fees.

Moreover, the weakness of the City's argument is demonstrated by an examination of three (3) of the procedures whereby the government obtains tax or fee revenues: (1) The least intrusive procedure is for the government to mail out a bill to an individual for services rendered, or to be rendered, If he or she does not pay the bill in a timely fashion, the government is authorized to file a civil action to collect the unpaid bill. No lien is imposed unless the government obtains a judgment in court. The billings in Joint Exhibits Nos. 1, 3, and 4 reflect this approach. (2) A more intrusive procedure is for the government automatically to impose a lien on the individual's property for what is owed in addition to mailing out a bill to that individual. This is the procedure that is followed with respect to ad valorem taxes on real estate. (3) The most intrusive procedure is for the government, through a withholding process, to prevent the individual from even touching the money in question in the first place. This is the procedure utilized for obtaining income-tax revenues.

The least intrusive procedure is the one that is clearly authorized in W. Va. Code §§ 8-13-13 and 8-13-15. Pursuant to its collection authority under W. Va. Code §8-13-13, the City mails out bills such as the one reflected in Joint Exhibit No. 4. If the billed individual does not pay, the City's treasurer is authorized, under the provisions of W. Va. Code § 8-13-15, "to enforce this liability by appropriate civil action in any court of competent jurisdiction." The more intrusive procedure, involving the imposition of a lien on the individual's property as well as the mailing of the bill, is expressly prohibited by a sentence in W. Va. Code § 8-13-13 that reads: "The municipality shall not, however, have a lien on any property as security for payments due under such ordinance". The most intrusive procedure, involving the withholding of pay from the individual, is not mentioned anywhere in W. Va. Code §§ 8-13-13 or 8-13-15.

The City wants the Court to believe that the Legislature, which explicitly authorized the least intrusive procedure and explicitly prohibited the more intrusive procedure (involving lien imposition), intended that municipalities be authorized to use the most intrusive procedure, involving withholding. This line of argument simply does not make sense. Expressio unius est exclusio alterius.

Mr. Cooper would further note that, In enacting the 2004 bill that authorizes qualifying municipalities to impose a "pension relief municipal occupation tax", the Legislature, in new W. Va. Code §8-13C-3(b), made its intent clear: "Each employer with a taxable employee, during each pay period, shall withhold. . ." (Joint Exhibit No. 28; p. 6) No such intent to authorize or require withholding appears in W. Va. Code § 8-13-13.

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.

On pages 27 and 28 of its Brief, the City tries to justify its conduct and also claims that it has revised the forms that were made part of the stipulated evidentiary record. The fact remains that the "fee" ordinances, the regulations issued pursuant thereto, and supporting forms, as identified on page 40 of the Initial Brief, authorize or require the disclosure or release of Social Security numbers to officials of the City.

Under some of the statutes cited in the Initial Brief, it is generally illegal for an employer to release certain tax information, including Social Security numbers, of an employee to third parties. By requiring employers and independent contractors to release this information to City officials, the "fee" ordinances violate the privacy of individuals who work in the City's corporate limits and also violate these statutes.

Just because an employee of the City may be in the public sector does not mean that he or she has a right to review confidential tax information.

Furthermore, giving more public-sector employees access to Social Security numbers increases the chances that someone in the private sector will obtain that information, through accident, through theft, or through other means.

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.

Mr. Cooper stands on the arguments that he made on pages 41 and 42 of his Initial Brief.

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 employers liable for the debts of their employees.

Mr. Cooper stands on the arguments that he made on pages 42 and 43 of his Initial Brief.

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.

Mr. Cooper stands on the arguments that he made on pages 43 and 44 of his Initial Brief.

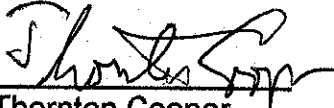
IV. THE RELIEF PRAYED FOR.

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 City from enforcing them; overrule conflicting cases; require the City 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

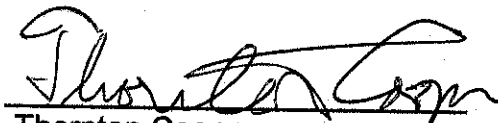
Pro Se


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

Dated: June 29, 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 Reply Brief" upon the City of Charleston, the Defendant below and the Appellee herein, by hand-delivering 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 hand-delivering another copy thereof to the office of another of its attorneys, Karen Tracy McElhinny, Esq., Shuman, McCuskey & Slicer, at 1411 Virginia Street, East, Charleston, WV 25301, and that I have served that Brief upon the West Virginia Municipal League, Inc., a possible amicus curiae, by hand-delivering a copy thereof to the office of one of its attorneys, Dennis R. Vaughan, Jr., Esq., Vaughan Law Firm, at 2020 Kanawha Boulevard, East, Charleston, WV 25311, all on this 29th day of June, 2005.


Thornton Cooper