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Supreme Court of Appeals
Richmond, Va.

211 VA 715

Record No. 7392

In the Supreme Court of Appeals of Virginia at Richmond

FAIRFIELD DEVELOPMENT CORPORATION

v.

CITY OF VIRGINIA BEACH, A MUNICIPAL CORPORATION

FROM THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

RULE 5:12—BRIEFS

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of this Court and three copies shall be mailed or delivered by counsel to each other counsel as defined in Rule 1:13 on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 7392

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Monday the 19th day of January, 1970.

FAIRFIELD DEVELOPMENT CORPORATION,
Appellant,

against

CITY OF VIRGINIA BEACH, A MUNICIPAL CORPORATION, Appellee.

From the Circuit Court of the City of Virginia Beach
Robert S. Wahab, Jr., Judge

Upon the petition of Fairfield Development Corporation, an appeal and *supersedeas* is awarded it from a decree entered by the Circuit Court of the City of Virginia Beach on the 30th day of September, 1969, in a certain chancery cause then therein depending, wherein the said petitioner was plaintiff and City of Virginia Beach, a municipal corporation, was defendant; upon the petitioner, or some one for it, entering into bond with sufficient security before the clerk of the said court below in the penalty of $300, with condition as the law directs.

RECORD

page 1 }

* * * * *

PETITION FOR DECLARATORY JUDGMENT AND FURTHER RELIEF

To the Honorable Judge of the said Court:

For its Petition herein filed, plaintiff respectfully represents as follows:

1. That it is a Virginia corporation duly chartered under the laws of the State of Virginia, with its principal office in the City of Virginia Beach, Virginia;

2. That it, as fee simple owner of certain real property situate in the City of Virginia Beach, Virginia, did intend to record and did finally record in the Clerk's Office of the Circuit Court of the City of Virginia Beach, Virginia, a final subdivision plat which fully complied with the requirements of the laws of the State of Virginia and of said City and were duly approved by the proper authorities as required by law;

3. That as a condition precedent to the acceptance by the Clerk of this Honorable Court of said plat for recordation and pursuant to the requirements of the then existing Ordinance Number 230 of said City, petitioner paid,
page 2 } under protest and duress, unto the Treasurer of the City of Virginia Beach, Virginia, the sum of $2,660.00, on or about September 9, 1968;

4. That Ordinance 105, as enacted by the defendant City (subsequently improperly reenacted by Ordinance No. 230), was declared unconstitutional and invalid by the Supreme Court of Appeals of Virginia on September 6, 1968, in the case styled *"National Realty Corporation* v. *City of Virginia Beach, et al,"* Record Number 6761;

5. That the defendant, having exacted said sum under an ordinance which is unconstitutional, null and void, is under an obligation and duty to refund to your petitioner the sum of $2,660.00;

6. That your petitioner not only paid said funds under protest but in addition demanded of the defendant a refund of the sum herein alleged to have been paid to the City Treasurer, which demand for refund was made directly to the City Council of the defendant City. The City Council, in formal session, denied plaintiff's demand for refund by unanimous vote of said City Council at its regular meeting on February 10, 1969;

7. That there existed no valid municipal ordinance providing authority to the City to exact the sum of $2,660.00 as a prerequisite to the recordation of plaintiff's subdivision plat to which said payment referred.

8. Your petitioner and plaintiff further alleges that the Charter of the City of Virginia Beach, Virginia, was amended by the General Assembly of Virginia on March 13, 1968 (Acts of Assembly 1968 Chapter 192, page 265) by providing in said Charter an additional power to the defendant City as follows, to-wit:

"To establish and collect such fees as may be determined by the Council to be reasonable for the rendering of special services."

page 3 } 9. That no valid ordinance was enacted by the City of Virginia Beach pursuant to the Charter Amendment aforesaid or otherwise prior to the actual receipt by the City of the September 9, 1968 payment providing for the exaction of the fee in question; therefore your petitioner alleges that the defendant City illegally retains the sum involved and is thus indebted to the plaintiff as above set forth;

10. That the Charter Amendment aforesaid is invalid because of the fact that:

(a) Said Charter Amendment violates the 14th Amendment to the Constitution of the United States, and Sections 1 and 11 of Article 1 of the Constitution of Virginia in that said Charter Amendment deprives the plaintiff of its property without due process of law and denies the plaintiff its right to equal protection of the laws, and said Charter Amendment is further vague, indefinite, sets out no standards to which events or state of facts the rights granted unto the City apply, and the action of the State in amending the Charter of the City of Virginia Beach does constitute an unlawful grant by the State of Virginia to said City which, if the State itself had arrogated unto itself would have been invalid, since the State of Virginia has no such power as was granted to the City pursuant to said Charter Amendment; that in addition said statute amending said Charter failed to define what powers were intended to be granted to the City nor does the same define the vague and indefinite phrases, "determined by the Council to be reasonable", or what is meant by "the rendering of special services."

11. That assuming, but not admitting the constitutionality of said Charter Amendment, Defendant City has nevertheless failed properly to enact any ordinance pursuant thereto.

Ordinance 230, adopted June 24, 1968, and pursuant to which said City exacted the sum in question from petitioner, reads and was enacted as follows:

page 4 } "Be It Ordained By The Council of the City of Virginia Beach, Virginia:

That Ordinance No. 105, adopted on August 10, 1964, and providing a fee for the approval of final plats of subdivisions is hereby reordained and reenacted as formerly ordained."

The mode of enactment of Ordinance 230 contravenes the requisites of Article IV §52 of the Constitution of Virginia which provides "... nor shall any law be revived or amended with reference to its title; but the act revived or the section amended shall be reenacted and published at length."

Furthermore, Ordinance 230 does not show on its face that the City Council deemed the fee imposed of $25.00 per lot as reasonable, nor does the official record indicate any such action, which action is commanded by said Charter Amendment; nor is the same a reasonable charge for the examination and approval of final plats of subdivisions, said charge bearing no fair or reasonable relationship to the cost involved to the City and is therefore arbitrary and invalid.

As the law is well settled that an unconstitutional ordinance is a nullity in the eyes of the law, as though it had never been passed, "reenactment" and "reordination" of a nullity, as was attempted by said City Council, cannot be said to create any legal rights, powers, duties, liabilities, or interests.

Wherefore, Plaintiff respectfully petitions this Honorable Court to determine the rights of the plaintiff to the refund of payment aforesaid made by the plaintiff to said City; to determine whether or not said Charter Amendment is valid, and for a judgment order by way of further relief ordering the City of Virginia Beach to make refund to the plaintiff of the sum of $2,660.00, plus interest thereon at
page 5 } the rate of 6% per annum, from September 9, 1968, plus plaintiff's costs in this behalf expended.

Respectfully submitted,

Fairfield Development Corporation

By Norris E. Halpern
Of Counsel for Petitioner

* * * * *

Filed in the Clerk's Office the 11 day of March, 1969
John V. Fentress, Clerk Phyllis Newman D. C.

* * * * *

page 8 }

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DEMURRER

Comes Now the defendant, City of Virginia Beach, and demurs to the plaintiff's Petition for Declaratory Judgment and Further Relief on the grounds that the plaintiff has an adequate remedy at Law.

City of Virginia Beach

By Harry T. Marshall
Of Counsel

* * * * *

Filed 4-14-69
P. Newman

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page 9 }

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DECREE OVERRULING DEMURRER

This cause came on to be heard upon the Plaintiff's Petition for Declaratory Judgment and Further Relief and upon the Defendant's Demurrer thereto, and was argued by counsel for both Plaintiff and Defendant.

Whereupon, the Court having maturely considered the issues raised by the Demurrer, It Is Decreed That said Demurrer be overruled, to which action of the Court the Defendant duly excepted,

And It Is Further Decreed That the Defendant is hereby allowed fifteen days from the date of the entry of this decree in which to file responsive pleadings.

Enter: 4/22/69 RSW

Seen: Norris E. Halper, p.q.

Seen and excepted to:
Harry T. Marshall, p.d.

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* * * * *

ANSWER AND GROUNDS OF DEFENSE

The City of Virginia Beach, by its counsel, makes answer as follows:

1. It has no knowledge of the truth of the matters alleged in paragraphs 1, 2, and 3 of the petition herein filed and calls for strict proof thereof.
2. Paragraph 4 of said petition is irrelevant to the cause of action sought to be stated and the City moves that it be striken as surplusage.
3. The City denies that Ordinance 230 is unconstitutional and denies that it is under any obligation to refund any monies to the petitioner.
4. The City has no knowledge of the truth of the allegations in paragraph 6 of the petition with respect to any protest and calls for strict proof thereof. The City admits the remaining allegations of paragraph 6.
5. The City denies the allegations contained in paragraph 7 of the petition.
6. The City agrees with the allegations set forth in paragraph 8 of the petition.

page 11 } 7. The City denies the allegations of paragraphs 9, 10, and 11 of the petition.

And having fully answered, the City prays that it be dismissed and allowed such costs as it may have incurred.

City Of Virginia Beach

By Harry T. Marshall
Of Counsel

* * * * *

Filed 5-7-69
P. Newman

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page 12 }

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FINAL DECREE

This Cause came on to be heard upon the petition for de-

claratory judgment and further relief herein filed, and upon the papers formerly read herein and the decree heretofore entered overruling the demurrer herein filed, and upon the agreement of counsel for plaintiff and defendant that this suit be consolidated and tried together with the following causes:

Avalon Hills, Inc. vs. *City of Virginia Beach, LuMarRo Development Corporation* vs. *City of Virginia Beach, Point "O" View, Inc.* vs. *City of Virginia Beach, and Terry Corporation of Virginia* vs. *City of Virginia Beach*

and it is

Ordered that said causes be consolidated for the purposes of a trial in this Court;

And this cause was further heard upon the evidence introduced *ore tenus* in open court and the same was thereupon argued by counsel for plaintiff and defendant

And it appearing to the Court that the plaintiff paid under protest involuntarily unto the City of Virginia Beach the sum of $2,660.00 on or about September 9, 1968; but that at the time of said payment Section 2.02 (e) of the Charter of Virginia Beach vested in the City of Virginia Beach the

page 13 } power to establish and collect such fees as may be determined by the Council to be reasonable for the rendering of special services and that on June 24, 1968, and prior to said payment the City of Virginia Beach enacted Ordinance Number 230, which reordained and re-enacted Ordinance Number 105 by title (which ordinance No. 105 was declared invalid by the Supreme Court of Appeals of Virginia on September 6, 1968); and

It further appearing to the Court that the Charter Amendment, as well as Ordinance 230 are valid enactments and that the plaintiff has failed to prove by a preponderance of the evidence that the charge of $25.00 per lot for approving a subdivision plat is exorbitant or unreasonable;

Now, Therefore, it is hereby Adjudged, Ordered and Decreed that the plaintiff is not entitled to a refund of said payment and its petition for a declaratory judgment and further relief is hereby ordered to be dismissed; to which action of the Court the plaintiff duly excepted.

Enter 9/30/69 PWA

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page 14 }

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NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

Plaintiff, Fairfield Development Corporation, a Virginia corporation, respectfully gives Notice of Appeal from a final decree entered in this suit in favor of the Defendant on the 30th day of September, 1969, and assigns errors as follows:

1. The Court erred in its ruling that at the time of the payment by the Plaintiff to the City of Virginia Beach of the sum of $2,660.00 on or about September 9, 1968, Section 2.02(e) of the Charter of the City of Virginia Beach was a valid enactment in its application to the facts of this cause.

2. The Court erred in its ruling that Ordinance Number 230 validly reordained and re-enacted Ordinance Number 105, which was declared invalid by the Supreme Court of Appeals of Virginia on September 6, 1968.

3. The Court erred in its ruling that the Plaintiff failed to prove by a preponderance of the evidence that the charge of $25.00 per lot for approving a subdivision plat is exorbitant and unreasonable.

4. The Court erred in entering a final decree on September 30, 1969, dismissing the Petition for Declaratory Judgment and Further Relief filed by the Plaintiff herein.

Respectfully submitted,

Fairfield Development Corporation

By Norris E. Halpern
Of Counsel

Filed 10/13/69
J. Curtis Fruit

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page 16 }

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NOTICE OF ASSIGNMENT OF CROSS ERROR

Defendant, City of Virginia Beach, respectfully gives Notice of Assignment of Cross Error as follows:

The Court erred in its ruling on April 18, 1969, as set forth in the order entered herein on April 22, 1969, in not sustaining the demurrer filed by the Defendant.

Respectfully submitted,

City Of Virginia Beach

By Harry T. Marshall
Of Counsel

* * * * *

Filed 10/27/69
J. Curtis Fruit

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page 3 }

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Stenographic transcript of the proceedings had upon the trial of the above-entitled cause in said court on September 18, 1969, before the Honorable Robert S. Wahab, Jr., judge of said court.

APPEARANCES:

Messrs. Halpern and Kent (Mr. Norris E. Halpern) for the plaintiffs.

Mr. Harry T. Marshall for the City.

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The Court: Is there any doubt about the facts in the matter?

Mr. Marshall: The only doubt as to the facts, your Honor, is this: that the plaintiff—correct me if I'm wrong, Norris—the plaintiff alleges that certain things were paid under protest.

We admit that the paying party stated it was under protest, but we contend that as a matter of law it was not in fact a protest, and we have a case in point, sir.

The Court: You mean there's nothing in writing to show that the payment—

Mr. Marshall: There is, I believe, on each check.

page 7 } Is that correct? Well, except two of them. On two of them verbal protests were made.

Mr. Halpern: Verbal only.

Mr. Marshall: Um-hum. But with respect to Terry Corporation, both checks are marked "Paid under protest."

The Court: This involves a fee for what? Recording the plat?

Mr. Halpern: As a condition to recording a subdivision plat Ordinance number 105 provided that before recording a subdivision plat the city treasurer had to be paid the sum of $25.00 per lot. The party submitting the plat had to first go to the city planning commission to get an assessment or bill. He took it to the city treasurer's office and paid it. He was then required to take the receipt to the clerk and the clerk would not record the plat unless that receipt was presented showing the payment to the city treasurer of the $25.00 per lot plat fee.

In addition, the party had to pay the cost for recording the plat due the State of Virginia, as prescribed by statute, to the clerk of court, as well as the costs of recording the plat.

The Court: Well, now, the—as to Ordinance Num-

page 8 } ber 105, has not the Supreme Court of Appeals ruled as to the validity of that ordinance?

Mr. Halpern: Yes, it ruled that the ordinance was invalid. And it was a situation with all the facts similar to the first check of August 1, 1967, of Terry Corporation of Virginia. And also similar to May 10, 1968.

The Court: Where's the difference in the situation between these—

Mr. Halpern: There was a charter enactment which took place on—

Mr. Marshall: Effective March 13th, your Honor.

Mr. Halpern:—March 13, 1968, which permitted the City—I'll read the charter provision.

The Court: Well, first, Mr. Halpern, will you tell me the grounds on which the Supreme Court of Appeals held Ordinance 105 invalid?

Mr. Halpern: They held that it was invalid because there was no authority in the City to enact the ordinance. That there was no provision whatsoever under the sub-

page 9 } division ordinance, under the State law, or in the charter of Virginia Beach, which gave it the authority to enact such an ordinance. Then—

The Court: Now, does the amendment of that ordinance overcome the objection?

Mr. Halpern: No, sir. Timewise, as to the first check of Terry Corporation, that's dated May—

The Court: Let's disregard that one for the moment. Let's talk about—

Mr. Halpern: May 10th.

The Court:—payments after the ordinance became—

Mr. Halpern: May 10, 1968. We're dealing with Terry Corporation only now.

The Court: All right.

Mr. Halpern: May 10, 1968. And I will read to your Honor the provisions of the charter. The 1968 General Assembly amended the City charter by adding subsection (e) as follows:

"Section 2.02. Additional powers. Without limiting the generality of the foregoing"—Section 2.01 conferring on the City the power set forth in Code section 15-77.1 through 15-77.70; in our Code section 15.1-837 through page 10 } 15.1-907—"but in addition thereto, the City of Virginia Beach shall have the following additional powers:

"(e) *Imposition of special fees.* To establish and collect such fees as may be determined by the council to be reasonable for the rendering of special services. (Acts 1968, chapter 192, page 265.)"

Now, at that time—

The Court: Would you read that last part—"To establish and collect" fees reasonable—

Mr. Halpern: "To establish and collect such fees as may be determined by the council to be reasonable for the rendering of special services."

The Court: Now, it's your contention that the fee is not reasonable, no special service rendered?

Mr. Halpern: I have a number of contentions. One is that that provision is invalid, because it's vague, indefinite, and uncertain. You don't know what it might apply to. If you call up to report a fire and ask the fire department to come and put out a fire at your residence the City can send you a bill. We don't know what it applies to. It's so page 11 } vague, indefinite, and uncertain as to be meaningless. That's one of our positions.

Secondly, when an act is declared or an ordinance is declared invalid it becomes a nullity. And I have authority for that. So that this was merely an enabling act at best even if it were valid and it required the enactment of an ordinance pursuant to it, which should state in its preamble which the City council deems reasonable for the rendering of the services in connection with the recordation of plats.

Now, if your Honor wants to hear my law at this time I'll be glad to go into it.

The Court: Well, I think that would be the best—

Mr. Halpern: All right.

The Court:—way to proceed.

Mr. Halpern: In 179 Virginia, page 70, our Supreme Court held that an invalid ordinance is as invalid as though never passed, which means it continues to be invalid until reenacted by a vote of the council.

Now, that's the situation we had when this charter amendment was made. The Ordinance Number 105 had been declared invalid and it had not been reenacted de-
page 12 } spite this charter provision.

Mr. Marshall: May I have that citation again, please?

Mr. Halpern: 197 Virginia—179 Virginia, page 70.

The Court: Do I understand that there never was any ordinance enacted after the charter—

Mr. Halpern: There was, but at a later date. Now, I can give your Honor that date.

Mr. Marshall: June 24th.

Mr. Halpern: June 24, 1968, the City of Virginia Beach adopted Ordinance number 230 entitled, "An Ordinance to reenact and reordain Ordinance number 105 adopted August 10, 1964," and providing a fee for the examination and approval of final plats of subdivisions, and it reads as follows: "Be it ordained by the Council of the City of Virginia Beach that Ordinance Number 105 adopted on August 10, 1964, and providing a fee for the approval of final plats of subdivisions is hereby reordained and is hereby reordained and reenacted as formerly ordained." Its first reading was on June 10, 1968. Its second reading was on June 24, 1968.

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page 13 }

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The Court: Before we apply the law to the various situations suppose we proceed. We haven't determined whether or not you contest the payment of fees after June 24, 1968, pursuant to this—

Mr. Halpern: Yes.

The Court: On what grounds?

Mr. Halpern: On the grounds that the charter authorization is invalid, because it's too vague, indefinite, and uncertain.

And, secondly, the Constitution of Virginia, Article IV, Section 52, provides as follows:

"No law shall embrace more than one object which shall be expressed in its title; nor shall any law be revived or amended with reference to its title, but the act revived or the section amended shall be reenacted and published at length."

Now, if that applies to the State of Virginia, a municipality is the arm of the state, and if a state had done this and it would have been invalid, then, a fortiori, a city which is an arm of this state has no authority to enact an ordinance by reenacting it by title.

page 14 } Now, in Williams against the City of Richmond—

The Court: What was the Constitutional section? Section four what?

Mr. Marshall: Section 52.

Mr. Halpern: It was Article IV, Section—

The Court: Section 52.

Mr. Halpern:—52. And this Ordinance was not reenacted at length, but only by title. And as to the vagueness of the Statute in Williams against City of Richmond—

The Court: Excuse me. Now you are talking about the vagueness of the Ordinance or—

Mr. Halpern: Vagueness of the charter amendment. I'm relying on Williams against City of Richmond, 177 Virginia, page 477.

"Tax laws are always to be liberally construed in favor of the taxpayer and they are not to be extended by implication. If there be substantial doubt it must be resolved in (favor of the taxpayer, et cetera.)"

One of the prime requisites of any statute is certainty.

And this is especially true of a taxing Statute. If the terms in which a Statute is couched be so vague as to
page 15 } convey no definite meaning to those whose duty it is to execute it momentarily or judicially, it is necessarily inoperative. The test is not what has been done, but what may be done under its provisions.

Now, this charter provisions says that the City can establish and collect such fees as may be determined by the council to be reasonable for the rendering of special services. It makes them the arbiter of reasonableness. It doesn't set forth any standards and it doesn't define special services. And we don't know—neither your Honor nor I can in reading this charter amendment in all honesty can say to what does it apply. We have special Statutes which provide for inspection fees and we have Ordinance number 77 of the City of Virginia Beach, which provides for an imposition of inspection fees pursuant to that Statute. But that's because the law already permits and defines specifically what a city can do. But to pass a provision that a council can in its sole judgment deem something to be reasonable without defining the standards by which they shall be governed and—

I had the case of Robert against the City of Nor-
page 16 } folk, which held in effect that an ordinance has to be reasonable and cannot delegate—you cannot delegate a legislative authority to an administrative officer. In that case is involved the right of a publishing company to sell magazines on the city streets. And the City of Norfolk passed an ordinance forbidding the sale of anything on the city streets without a permit from the director of public safety. And I contended in my argument that that was vague and indefinite, that the director of public safety could grant your Honor a permit and deny me one, and permit your Honor to sell magazines on the city streets and deny me the right to sell the same magazines. And the court, in effect, upheld my contention in that case.

Now, the rendering of special services has a meaning so vague and indefinite as to—

The Court: Well, let's go back to the one you just referred to.

Mr. Halpern: Yes.

The Court: Are you talking about the Supreme Court of Appeals upheld your contention in the Norfolk city ordi-
nance prohibiting the distribution or selling of
page 17 } any—anything on the street without a permit?

Mr. Halpern: Yes. They held that—

The Court: Well, that wasn't the basis for that decision.

Mr. Halpern: The basis of that decision was that it was an

unlawful delegation of administrative powers—of legislative powers to administrative officers was one of the bases.

The other was it was an infringement on the freedom of the press.

And the third point that I advanced was that it—

The Court: But on what grounds did the Supreme Court determine it?

Mr. Halpern: Determine that case?

The Court: The Constitutional grounds is denial of the right of free press, was it not?

Mr. Halpern: No, they also agreed with me that it was unlawful delegation of legislative powers to administrative officer, to the director of public safety, because he had no standard by which to go by in issuing the permits.

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Mr. Marshall: Your Honor, the case cited by Mr. Halpern with respect to compliance with Section 52 of the Constitution—I call the court's attention to the case of *Campbell* against the *City of Danville,* your Honor, 138 Virginia, 817. And referring to the same Constitutional provision the court states at the top of page 821 that the prohibitions and strictures imposed by Section 52 have no application

page 19 } to the enactment of municipal ordinances.

The Court: That is, "The constitutional provision that no law shall contain more than one object, which shall be expressed in its title, has no application to the ordinances adopted by municipal corporations."

But they have the authority that it's not necessary to set forth the—an ordinance in full. And there is such—I know that there is such a section which simply says that you must—as is sufficient—that the order of publication or any publication of an ordinance. It fairly sets forth the purport and scope of the ordinance. It does not have to be published.

Mr. Marshall: My opinion is simply this, your Honor: that the section which requires the setting forth the—that was cited by Mr. Halpern, Section 52, governs both aspects. And they say that—as I understand the court in this case, they're saying that Section 52 does not apply to the enactment of municipal ordinance.

The Court: "The constitutional provision that no law shall contain more than one object, which shall be expressed in its title, has no application to the ordinance adopted

page 20 } by municipal corporations." Well, that's true, but the further point that's been raised by Mr. Halpern is that not the question of an ordinance containing more than one object or purpose, but the further provision in this section of the Constitution, 52, that "nor shall any law be revived or amended with reference to its title, but the act revived or the section amended shall be reenacted and published at length."

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Mr. Halpern: Veto, that's correct. But does your Honor understand my point that it cannot be reenacted by title; that it has to be reenacted by the use of the same words as Ordinance number 105 contained. If that was the page 24 } intent of the city council, if it's unconstitutional for a state to do it I don't see how it could be valid for us.

The Court: Well, I want to read this case in its entirety, which Mr. Marshall has presented to the court, the one—*Campbell versus the City of Danville.* The court there held that the one provision of the same section of the constitution was not applicable to city ordinances. Of course, their reason was that if the same logic applies to the other section then I think it must follow that it has no applicability to city ordinances with respect to the provision that the law cannot—or an ordinance cannot be enacted by—may not be revised or amended unless reenacted and published at length.

Mr. Marshall: Your Honor—

The Court: Gentlemen, let's take a recess. No use sitting here while—

Mr. Halpern: Will your Honor also read page 146 Virginia. The same judge later ruled contrary to—

The Court: Campbell case?

Mr. Halpern: Campbell case.

The Court: Overrule the Campbell case?

page 25 } Mr. Halpern: No, but the other section applies to local laws as well. Mr. Marshall says that it—it's a state tax which granted to the school board a body power to issue bonds and it did not apply to section—the section of the Constitution that I just read to you—and that it applied to local law as well.

Mr. Marshall: I think the court's aware that term "local law" does not necessarily mean an act passed by a local

governing body, but rather laws that are passed by the General Assembly that are local in effect.

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page 26 }

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The Court: Gentlemen, the case Mr. Halpern referred to of *Breckenbridge versus School Board,* 146 Virginia, 1—I read the case. Nowhere does it mention Section 52, which we're concerned with here. It did refer to Section 53, but not Section 52. So, of course, that is not a case in point at all.

As to the first grounds for attacking the validity of it—of the ordinance of the city council, which became effective on June 24, 1968, which ordinance reenacted and reordained Ordinance 105—the first grounds being that it is indefinite, vague—beg your pardon. The first ground is that the city charter amendment enacted by the legislature was—is indefinite and vague.

Mr. Halpern: That was March 13, 1968.

The Court: Yes. That amendment as to the city charter reads as follows: it amends Section 202 of the city charter dealing with additional powers by adding paragraph (e), which reads as follows:

page 27 } *"Imposition of special fees. To* establish and collect such fees as may be determined by the council to be reasonable for the rendering of special services."

The crux of the attack seems to be that it—that the legislature has empowered the council to determine for itself what is reasonable. The court's of the opinion that that argument is not sound for the reason that although the council may recite that a fee appears to be reasonable to the council and impose a fee for special service, the action of the council is always subject to judicial review to determine if in fact a fee is reasonable in the light of special services which may be rendered for that fee. For that reason I do not think that the amendment to the city's charter through March 13, 1968, is unconstitutional or invalid.

Mr. Halpern: Now, may I raise my other point here that it's vague, indefinite, and uncertain, and does not prescribe any standards or limitations by which the council shall be governed or does it define what constitutes special services. And your Honor may rule upon that now.

page 28 } The Court: Well, as far as the designation of a standard, prescribing what a special service is concerned, would be unwieldy and almost impossible to do in a general empowering act of the legislature to accomplish that.

Again, whether or not the—a fee which may be imposed by ordinance is reasonable in the light of the special services which it—the city renders is subject to judicial review. It must not be discriminatory. It must not be arbitrary. But it must be reasonable in the light of the service which is rendered by the city.

Now, again, this is subject to judicial review, and I do not think that the—in the opinion of this court that the amendment is unconstitutional on any of these grounds alleged by counsel for the plaintiff's in these cases.

Mr. Halpern: Did your Honor read what the court said in Robert against the City of Norfolk about prescribing of standards?

The Court: Yes, sir. This—

Mr. Halpern: All right, then, I—

page 29 } The Court: This has to do with the delegation of quasi-judicial powers to an administrative body, and not to the delegation of the powers of the state, to a political subdivision of that state, a city. Now—

Mr. Halpern: May I note my exception to the court's ruling?

The Court: Yes, sir. Yes, sir, you may. As far as the section of—52.

Mr. Halpern: Of the constitution.

The Court:—applying to the ordinance with respect that no ordinance shall be amended or reenacted without setting it forth at length. Well, the wording of the second clause of that Section reads, "but the act revived or the section amended shall be reenacted and published at length."

Now, as we have already observed in the case of *Campbell versus the City of Danville,* the Supreme Court of Appeals held that this particular constitutional provision was applicable to acts of the legislature only and not to ordinances enacted by political subdivisions of the state with respect to its requirement that only one subject matter should be embraced in the title.

page 30 } Now, the opinion of the court in that respect simply reads as follows:

"The validity of the ordinance is also assailed on the ground that it has no title, and that it is necessary for an

ordinance as well as a statute to have a title.

The constitutional provision that no law shall contain more than one object, which shall be expressed in its title, has no application to the ordinances adopted by municipal corporations."

I think it follows that the constitutional provision as to setting forth the—an ordinance—the attempt to apply the section of this—this section of the constitution in ordinances is not well taken, for that clause reads: "but the act revived or the section amended shall be reenacted and published at length", obviously referring to an act of the legislature or a part thereof. The reasoning is the very same as that which apparently was behind the ruling of the court in *Campbell versus the City of Danville,* and you find specified in several sections of AmJur 37; AmJur, Municipal Corporations.

Reading first from Section 145 at page 757:

page 31 } "The form and contents of ordinances and resolutions are sometimes prescribed by statute."

We do not have that situation in Virginia.

"In the absence of an express provision, a resolution need not be in any set form."

And then Section 146 beginning at the top of page 758—and here we have the rational behind the ruling of the court, I think, in the case of *Campbell versus the City of Danville.*

"The rule is well-settled that the constitutional provision common to the organic law in most of the American States, that no law or bill shall contain more than one subject, which shall be clearly expressed in its title, applies to state legislation only, and not to municipal ordinances; conformity of the subject matter to the title of an ordinance is not necessary unless required by statute."

. . .moreover, to require of municipalities the same certainty and care with respect to the title of ordinances which is required of the legislature in the enactment of laws for the state would be to require of municipal authorities greater precision than is contemplated by the law, or
page 32 } reasonably ought to be expected of bodies constituted as they are authorized to be."

"In general, such provisions"—that is, where the law does require that an ordinance having title indicating scope—we find this statement in AmJur, still Section 146, page 758.

"In general, however, such provisions are not strictly construed, and if the title of an ordinance fairly gives notice of the subject matter, so as reasonably to put any interested party upon inquiry, that is all that is necessary."

Now, dealing with the validity of ordinances, Section 155, page 767:

"In order to be valid and to have force and effect, ordinances enacted by municipal corporations must be constitutional, within the powers of the municipality, reasonable (in so far as the question of reasonableness is justiciable), equal, general, and impartial in operation, certain and definite in their provisions, not in conflict with general laws of the state, in some states, although not in others, must not forbid or regulate the same matters as are forbidden or regulated by the laws of the state, and, where the state Constitution, general statutes, or a specific municipal
page 33 } charter so required, the subject matter of the ordinances must conform to the title, although, unless specifically so designated, there is no such requirement."

And we have no such requirement in Virginia.

Now, all of these laws pertaining to the form of enactment of ordinances are designed so that there can be no uncertainty or question as to what the ordinance provides. So that persons who are affected by those ordinances will know what is prescribed in those ordinances, what they must do, and what they may not do under the provisions of the ordinance. And as long as that is fairly ascertained, regardless of the form of the ordinance, if it has been properly passed according to the law, then it is good.

Dealing with the question of certainty and definiteness, this could be the only underlying question presented in the attack on the ordinance on the grounds that the ordinance when reenacted was not spelled out at length, but referred to a prior ordinance, which, although it had been held invalid by the Supreme Court of this state, nevertheless,
page 34 } was on the books and was a writing which could be resorted to, and—in the opinion of this court—could be incorporated by reference into a valid ordinance, concepts which are contained in the section which I'm about to read. Same volume, AmJur, Municipal Corporations, Section 163, page 785.

"It is a well-recognized principle of law that an ordinance must be defined and certain. Certainty is necessary in

order for an ordinance to meet the test of reasonableness. The reason that an ordinance, such as one of a regulatory or prohibitory nature, must be clear, definite, and certain is that an average man should be able, with due care, after reading the same, to understand and ascertain whether he will incur a penalty for particular acts or courses of conduct. If he cannot reach a determination from examination of an ordinance, it is void for uncertainty. There is no hard and fast rule determining whether any given ordinance is void for indefiniteness. The rule of reason must be applied to every case as it arises. An ordinance will be held to be sufficiently certain where it is obvious that an average man reading it will understand under what circum-
page 35 } stances he will be committing an offense which the ordinance purports to regulate or forbid and to punish.

"There is no objection, however"—I'm now reading from the last part of that Section 163—

"There is no objection, however, to an ordinance which, while unintelligible when standing alone, incorporates by reference some statute or other ordinance an examination of which will make the ordinance in question clear and definite."

In the opinion of this court the ordinance enacted by the City Council of the City of Virginia Beach on the 24th of June 1968—each of those meets those qualifications. Therefore, it is held that the ordinance is valid and enforceable.

Mr. Halpern: And I note my exception, if your Honor please, on the grounds stated, and on the further grounds that Article IV, Section 52 of the Constitution of Virginia provides: "nor shall any law"—and it does not say "act" at that point—"be revived or amended with reference to
17—7392.....
its title, but the act revived or the section amended shall be reenacted and published at length." That this
page 36 } section applies to local laws as well as to state laws, and that if an enactment by state is unconstitutional an enactment by a city is also unconstitutional if it comes within the teeth of a forbidden constitutional provision applying to a state, since the municipality is an arm of the state.

The Court: All right, sir.

Mr. Halpern: Now, I think we can proceed.

The Court: I think the court has already cited the authority that the formalities of—contained in the constitution of the state for the enactment of state statutes—is not applicable in the city ordinance, and reasons for that.

Mr. Halpern: Now, if your Honor please, there's one other point. And that is the question of whether or not the adoption of the charter amendment alone without subsequent enactment of an ordinance by the city had any effect.

The Court: Well, I think if we can just as well take it there. I don't think that you can breathe life into a—

Mr. Halpern: Dead—

The Court:—act which was void *ab initio* as
page 37 } if never committed. That's my offhand position.

* * * * *

page 40 } The Court: I don't follow you. Were you reading that—unless you can show—I think it's a fundamental principle of law that if an ordinance—any law is void *ab initio* for the lack of jurisdiction or the authority to pass the law, then it never existed as a law. And when the legislature did empower the city to enact such an ordinance it didn't and could not revive that which was—which never lived. This is to be distinguised from the reason of the court that even though this ordinance did not have the force and effect of a law and as such could not exist, that, nevertheless, it is what purported to be an ordinance. It was in writing. And when the city attempted to reenact or reordain Ordinance 105 and did incorporated that by reference into the ordinance passed on June 24, 1968, that all of the requirements of an ordinance—has to be regular, valid, definite, and certain—had been met for anyone to go there and see what the ordinance included, what it encompassed, what it entailed, what was required simply by going to Ordinance number 105.

Now, gentlemen, I believe that with those gen-
page 41 } eral principles counsel ought to be able to work it out. The court's judgment would be—is that in each of the cases after this that I think that those who paid under protest the fees at any time prior to the passage of the ordinance on June 24, 1968, are entitled to a refund.

Mr. Marshall: May I be heard on that, your Honor?

The Court: I think that those who paid the fee afterward are not entitled to a refund.

Mr. Marshall: May I be heard before the court rules on that question?

The Court: Yes, sir.

Mr. Marshall: The case of the *City of Charlottesville* against *Marks' Shows,* 179 Virginia—excuse me. I got the wrong one. 179 Virginia at 321.

Mr. Halpern: 321, yes.

Mr. Marshall: Of—this goes to the question of what is a protest, your Honor.

The Court: Well, I said that those who paid under protest—I don't have any argument whether it's protest or whether it's not. I'm simply—I haven't ruled as to what was—

Mr. Marshall: Oh, I thought—

page 42 } The Court: —what was a proper protest.

Mr. Marshall: I understood you to say that they paid under protest.

The Court: If they paid under protest.

Mr. Marshall: Then—

The Court: I understand that it was only two checks involved where there was no formal protest noted, but there was—

Mr. Halpern: An oral protest.

The Court—an oral protest.

Mr. Marshall: Well, it's the City's position, your Honor—

The Court: Is there any question that the payments were made under protest?

Mr. Marshall: It's the City's position that they are not entitled to repayment, your Honor.

The Court: Why?

Mr. Marshall: This is what I was coming to. This is the Charlottesville case at page 332. I read from the opinion of the court in *"Virginia Brewing Company against Commonwealth, supra,* a license tax was paid to avoid prosecution and in order that the licensee might proceed with his business it was held that this was a voluntary payment and that the tax paid, although illegally assessed,

page 43 } could not be recovered. We there quoted with approval Burroughs on Taxation, page 443, as follows:

" 'Where the party, of his own motion, procures his license and pays the tax, if the tax be afterwards judicially decided to be illegal, he cannot recover. Such payment is not under compulsion, although the pursuit of the occupation, without the payment of the license tax, would subject the party to fine and imprisonment.' "

And further down on page 333 they decided on the particular case, the Marks' Shows case—the court states:

"When we examine the circumstances under which the taxes were paid in the present case we find that they were not paid under compulsion but were paid voluntarily.

"Marks, the president of the plaintiff corporation, testified that prior to the exhibition of his show near the City of Charlottesville in 1935, he visited the office of the commissioner of revenue of the city and was informed that he would be required to pay a city license of $50.00 per day for the privilege of exhibiting his show in the county.
page 44 } He expressed his surprise at this requirement and asked, "If I don't pay what will happen", to which the commissioner replied, "If you don't pay it we are going to close you up and levy on all of your stuff." Thereupon he paid the required license, stating that it was 'under protest'. This is almost precisely what occurred"—

The Court: Mr. Marshall, the court's only ruled that—my question to you was where the—where the checks show that they paid under protest is the City contending that the people are not entitled to a refund?

Mr. Marshall: Yes, sir, because that is not a protest within the meaning of the law.

The Court: Well, what is a protest?

Mr. Marshall: Well, in a case such as this, your Honor, the City's position is this: if the license—if the tax or the fee is an illegal tax or an improper imposition of the fee the proper procedure which should have been followed at the outset would have been a writ of *mandamus* or clerical judgment before any fees were paid. And that's the reason for the rule that is stated in the Marks' Shows case that—

The Court: They didn't differentiate between
page 45 } an oral protest and the written protest.

Mr. Marshall: The fact that he endorses—writes across his check "under protest" I don't think enlarges upon his standing any any way, your Honor.

The Court: May I read the case?

Mr. Marshall: Yes, sir.

The Court: This is the point we should have taken up first. Gentlemen, let me read this case.

Mr. Marshall: Before we recess I might say, your Honor, that this decision here follows a long line of cases.

The Court: I see. I don't see anything that says that there is—that may—taxes or fees paid out of protest—grounds that the ordinance is invalid cannot be recovered. So simply this case goes—I'll read the case. We'll recess.

Mr. Marshall: All right. Fine.

(At 12:15 p.m., September 18, 1969, court recessed, and reconvened at 12:28 p.m., September 18, 1969.)

The Court: Gentlemen, I have—we have been
page 46 } discussing general principles of law raised in these cases, and I don't know the specific form of the actions which were involved by these parties. Are all of them in the nature of declaratory judgment?

Mr. Halpern: Yes, sir. And they're all on the chancery side of court, and they're not in assumpsit, and they're asking the court to do exactly what the Supreme Court did in the National Realty case. And that is order the money to be repaid like in the nature of a *mandamus*. It was not a money judgment order. And I have that decision here. The concluding words of it are very significant, if I may read them.

The Court: Yes, sir.

Mr. Halpern: "The judgment of the trial court is reversed and the case is remanded with direction that a judgment be entered requiring the city to refund to the plaintiff the fees of seven thirty-five paid by it."

There's no money judgment whatsoever entered. If the city refused to do it they would be guilty of contempt.

The Court: Let me just ask you a few ques-
page 47 } tions, if I may.

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page 48 }

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Mr. Halpern: Now, this case is entirely different. The money was paid under duress. The money—we're not seeking assumpsit. We're in equity. It is inequitable and unjust to permit the City to retain these funds collected under an invalid ordinance. There's a vast distinction between that case and this one. There the City had authority to impose license taxes. In the case at bar the City had no authority whatsoever to collect this money. And there is a vast distinction there.

In addition, if your Honor will read the secondary authorities that are cited in that case—

The Court: Well, I'd like to just—let me—I've
page 49 } read the case. I've read the whole case and it substantiates the views expressed by the court prior to reading it that you can recover for taxes or money paid under protest. This case simply said that the fee paid in this case was not under protest; it was voluntarily paid. That's all I would hold. Nothing more.

Mr. Halpern: That's correct, your Honor.

The Court: But the case—

Mr. Halpern: Not only that. At law—I don't mean to interrupt your Honor.

The Court: I'm going to hear you out, but I just want you to know the reason for the court's statement: that it was of the opinion you have only two—you have only two ways under the law of recouping these fees or taxes which have been illegally imposed. One is you must file—follow the statutory procedure as in the case of erroneous assessment, or you have the option of filing a suit in assumpsit.

Reading from section number 9 in the *Charlottesville versus Marks' Shows* case:

"At common law taxes illegally levied and paid under compulsion may be recovered in an action of assumpsit for money had and received."

page 50 } And citing Cooley on Taxation ruling in the case of *Brown, Davis versus Greenhow* 80 Virginia, 118; *Stone versus White,* U.S. 532. Of course, there is a Statute of Limitations of three years applicable to an action on assumpsit on implied promise to pay.

Mr. Halpern: Right. Correct.

The Court: Now, if you can show me any authority that—

Mr. Halpern: I have authority, yes.

The Court:—that the person paying taxes or fees illegally assessed does not have to follow either the common law action of assumpsit or pursue any remedy that may be specially provided by statute for recouping such payments, I'll be glad to hear you.

Mr. Halpern: Yes, The court in the National Realty Corporation case just issued an order—

The Court: What type of action was it?

Mr. Halpern: It originally started out as a petition to correct an erroneous assessment, and Mr. Marshall took the position that it was not a tax but a fee for services rendered and did not come within the purview of—what was the title now? The old section was 414. I think

page 51 } it's Title 58 of the—

Mr. Marshall: Title 58.

Mr. Halpern: I can tell your Honor in a minute.

The Court: That's all right. Go ahead. In other words—

Mr. Halpern: Title 58. Now—

The Court: The Supreme Court did not view it as an action in equity, did they?

Mr. Halpern: No, sir.

The Court: The Supreme Court says so, but I'm not going to make new law here. I'm going to follow the established law. And it's set forth very clearly, as far as I can see, that your only remedy is to sue in assumpsit.

Now, there are two sides to the story. With a great deal of merit you can stand there and say that taxes or fees which have been exacted illegally should be refunded, because this is unjust to the—but there's also another concept which is reflected by our Statute of Limitations that one who has a cause of action must reasonably assert that cause of action.

page 52 } He cannot sit back, under your theory, for an indefinite period of time. We have a comparable doctrine of laches in equity—and pay fees to the City, and when this money is expended you can't come back at some indeterminate length of time and say, "Now I want all this money back." That's the reason for the Statute of Limitations. And, in the opinion of this court, it balances the rights of the parties. And I'm going to hold that the three years State of Limitations applies.

Mr. Halpern: May I be heard briefly?

The Court: Yes, sir.

Mr. Halpern: All right. First, I want to tell your Honor what happened in the first case. We were on the law side of court and I brought this petition in erroneous assessment. And Mr. Marshall argued and he made a motion to quash on the grounds that I didn't come under that section. I noted an exception to the court's ruling sustaining it. Then I filed a petition for declaratory judgment, which, as your Honor recalls, can be on either side of court. But since I was on the law side of court I stayed there and I asked the court for a declaratory judgment to determine whether or

page 53 } not the statute—the Ordinance 105 in question was valid or invalid; and if invalid, by way of further relief to compel the City to refund the funds, which is exactly what was done. And it was not in assumpsit, nor was it in the nature of assumpsit.

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Mr. Marshall: We'll stipulate—

Mr. Halpern: He'll stipulate that they were paid under protest.

Mr. Marshall: No, sir, that the witness stated that he paid under protest.

W. W. Reasor

The Court: Well, I'd like to know—this is—I don't know of any law which says whether or not the payment made under protest—the burden's upon the—

Mr. Halpern: The plaintiff.

The Court:—the plaintiff, for the payment of the fee and tax, to show that it was paid under protest. Of course, if it's in writing we've got no problem, but I expect you'd better—the burden is on you to show this.

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W. W. REASOR, called as a witness on behalf of the plaintiffs, having been first sworn, was examined and testified as follows:

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page 90 }

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REDIRECT EXAMINATION

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page 95 }

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Mr. Halpern: Now, will you make your stipulations on Fairfield Development Corporation? This is the case of *Fairfield D-E-V-E-L-O-P-M-E-N-T Corporation* versus *City of Virginia Beach.*

page 96 } Mr. Marshall: I think before we get into the stipulations, Mr. Halpern, the court has considered in advance the question of whether Ordinance number 230 was properly enacted. And I suggest to the court that this case involves payment made after the enactment of Ordinance number 230. Fairfield Development.

The Court: Well, let Mr. Halpern get his evidence.

Mr. Marshall: All right.

Mr. Halpern: Do you want to make your stipulations as far as—

Mr. Marshall: The City of Virginia Beach will certainly stipulate that Fairfield Development Corporation is a Virginia corporation duly chartered, as to paragraph 1, in effect, of the petition. As to paragraph 2 of the petition and as to paragraph 3, with the exception of the words "under protest" and "duress", I think—I think for the record purposes, Mr. Halpern, we—the City admits—

The Court: Gentlemen, let's—wait just a moment. Let the record show that by agreement of counsel that all of these cases as to the points they have in common are being tried together. And on the swearing of witnesses in
page 97 } the matter pending before the court includes all the cases in which the witnesses may be interested, because I don't think Mr. Reasor had been sworn in the Avalon case. All right, sir.

Mr. Marshall: I think that that's—does that conclude it, Mr. Halpern?

Mr. Halpern: No. We demanded a refund before the council.

Mr. Marshall: We admit that the petitioner demanded a refund from council, that the refund was denied.

Mr. Halpern: The sum of $2,660.00 paid September 9, 1960

Mr. Halpern: The sum of $2,660.00 paid September 9, 1960—

Mr. Marshall: We've already stipulated that, Mr. Halpern. The City certainly agrees that paragraph 8 relates to the amendment of the charter of the City of Virginia Beach. I guess that's all we agreed on, Mr. Halpern.

Mr. Halpern: All right. Can we stipulate that the arguments made prior to the trial of this case on the legal issues involved are reinstated here?

Mr. Marshall: And may be incorporated in this record.

The Court: Gentlemen, I think the court's state-
page 98 } ment is in the record that the matters are all being tried together and that the points in common in all the cases apply to each at all stages of this hearing in trial.

By Mr. Halpern:

Q. I show you a check—

Mr. Halpern: You want to look at this, Mr. Marshall?

Mr. Marshall: I think it would be nice.

W. W. Reasor

By Mr. Halpern:

Q. I show you a check dated September 9, 1968, made by Fairfield Development Corporation—

The Court: Mr. Reasor, what is your connection with Fairfield?

The Witness: President.

By Mr. Halpern:

Q. —payable to the order of V. A. Etheridge in the amount of $2,660.00, which contains upon its face the following language: "paid under protest, unjust," and ask you whether this is the check which is identified as the claim that you had made in your motion for judgment?

A. It is.

page 99 } Q. And did you in fact pay it under protest? And if so, to whom?

A. I did at V. A. Etheridge, treasurer's office.

Q. And at the time you made the payment did you make any statement to the party receiving the money on behalf of the city treasurer?

A. I did.

Q. What did you say?

A. That on this particular one I stated the fact that the case had been decided, that we wouldn't have to pay these, but they pointed out the fact that the ordinance had been reenacted. I told them I still paid under protest. Planning commission also. That and the city treasurer's office.

Q. And you demanded that the city council—that it be refunded?

A. Yes, I did.

Q. And it was refused?

A. Yes.

Q. Are you familiar with the charge that was exacted for approval of subdivision plats prior to the enactment of Ordinance 105 in the reenactment of Ordinance number 230. Is that the number of it?

Mr. Marshall: Reenactment was Ordinance 230. Original ordinance was 105.

page 100 } A. I was.

By Mr. Halpern:

Q. What was the fee charged by the City at that time?

A. About ten cents per lot based on the size of the plat, on the square inches of the plat.

Q. That was the recording fee?
A. That's the recording fee, yes.
Q. I'm talking about the fee charged by the planning commission.
A. There was no fee.
Q. You don't recall any fee?
A. No, sir.
Q. I thought there was a fee of twenty cents a lot. That's why I'm asking you.
A. That's not for the recording of the plat; that's for the—
Q. Approval?
A. —approval of it. That's not when you record it; that's before. That's when you first file your preliminary.
Q. What was that fee then for approval of the subdivision plat?

page 101 } A. Well, it's usually just a stated fee of five or ten dollars. Sometimes they would calculate it twenty cents, I believe, a lot.

Q. And it was raised to $25.00 a lot under this ordinance?
A. Yes.

Mr. Marshall: Your Honor, I object to this line of questioning.
Mr. Halpern: I'd like to—
Mr. Marshall: May I be heard, please?
The Court: Yes, sir.
Mr. Marshall: The petition filed by Mr. Halpern in this matter alleges—if the court will bear with me a minute—solely that an Ordinance 105, which has been declared invalid for the reasons stated in the decision of the Supreme Court of Appeals, was improperly reenacted under Ordinance 230. And there's no allegation in the petition that the standards applied by the city council were unjust, arbitrary, or unreasonable, and, therefore, I do not see why he should be presenting evidence as to what is a reasonable fee under Ordinance 230. I don't think that evidence is relevant to the hearing in this case since he is not alleging it. I don't think he should be allowed to offer such evidence.

page 102 } The Court: The court sustains the objection.
Mr. Halpern: Pardon?
The Court: I sustain the objection.
Mr. Halpern: I have stated—I note an exception. I have stated in my pleading that, "furthermore, Ordinance number 230 does not show on its face that the city council deemed the fee imposed of $25.00 per lot is reasonable, nor does the offi-

cial action indicate any such action—official record indicate any such action . . . which action is commanded by said charter amendment."

Then I said, "Nor is the same a reasonable charge for the examination and approval of subdivision plats and subdivision."

I don't see how I could have done it any better.

The Court: I overrule the objection based on what Mr. Marshall—

Mr. Halpern: On page 4.

The Court: All right, sir.

By Mr. Halpern:

page 103 } Q. And what was the charge under the re-enactment of Ordinance number 105 pursuant to Ordinance number 230?

A. $25.00 per lot.

Mr. Halpern: If your Honor please, I'd like to place in evidence Ordinance number 230.

The Court: Was—

Mr. Halpern: And Ordinance number 105.

The Court: Are they both the same charge?

Mr. Marshall: Yes, sir, charge remained the same.

Mr. Halpern: Yes, but that doesn't show the charge. I would like to place in evidence Ordinance number 105. If I could, I'd like to place in evidence number—Ordinance number 105 and ask that it be marked as Plaintiff's Exhibit 2.

The Court: I believe I will receive this and mark it as Plaintiff's Exhibit—it's really—

Mr. Halpern: That's Plaintiff's Exhibit in the case of Fairfield Development Corporation.

The Court: Yes, sir.

Mr. Halpern: That's the way we can identify it.

The Court: All right, sir. This check for $2,660.00, that has not been marked. That's Plaintiff's Exhibit 1 in this case.

page 104 } (Exhibit so marked by the court.)

Mr. Halpern: I ask that it be marked Plaintiff's Exhibit 1, Fairfield Development Corporation case.

The Court: Copy of Ordinance number 105, Plaintiff's Exhibit 2 in that case.

(Exhibit so marked by the court.)

Mr. Halpern: Your Honor, I place in evidence Ordinance number 230 and ask that it be marked Plaintiff's Exhibit number 3, Fairfield Development Corporation.

The Court: It will be received in evidence and so marked.

(Exhibit so marked by the court.)

The Court: All right, Mr. Halpern.

By Mr. Halpern:

Q. Are you familiar with the procedure of having plats approved? Have you had occasion to have them approved?

A. I have.

Q. In the city of Virginia Beach, Virginia?

A. I have.

Q. And will you tell the court just what the City's required to do, to your knowledge, with reference to approval of a plat if all you are going to do is record your plat and not develop the land. What would it—the City—have to do to approve your plat? Would it have to—what would it have to look for?

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Mr. Marshall: Your Honor, that question as it's phrased did not agree with the city law. The plats are not accepted for recordation. Plats are not accepted for recordation unless there is a plan of development with bond posted, so Mr. Halpern's question is misleading. Recording a plat with no plan of developing. This is not found in Ordinance 105, nor in 230, but in the subdivision laws of the City of Virginia Beach, your Honor.

The Court: Well, the ordinance provides that in addition to the fee charged for the examination of preliminary plats, a fee of $25.00 per lot shall be paid to the Treasurer of Virginia Beach for the examination and approval of final subdivision plats.

Mr. Marshall: But perhaps I didn't state the—make myself understood what I was trying to say, your Honor. Mr. Halpern's question was what would the city have to do in examination of a plat where the subdivider had no intention of further development at that time, and I say that that is contrary to the subdivision ordinance, because we do not accept plats unless there is a plan presented for the orderly development of the property and a bond posted to ensure such development. In other words, a subdivision purely for—

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W. W. Reasor

The Court: Let's cut through this, gentlemen.

Mr. Reasor, are you familiar with the procedure when you are ready to have your final plat recorded?

The Witness: Yes, sir.

The Court: What is it, sir?

The Witness: Well, the procedure—you bring it down, bring a bond with you, take it over and have—well, it's already gone through the various departments. Take it down to the planning commission. They compute the number of lots on there, multiply it by $25.00 and charge you $10.00 for looking at it. And then you take that receipt over to the treasurer's office and pay that fee and then you go to the clerk's office and pay a fee there. And that's all there is to record it.

page 107 } By Mr. Halpern:

Q. Have you had occasion to walk them through taking them through the various offices to be signed?

A. I walk practically all of them through.

The Court: Who does this? The planning commission?

The Witness: After the plat has been finally prepared with the engineering, you take it to the planning commission once you're finished with it, and they compute the number of lots. They count the number of lots on there. That's—the planning commission does this. They count the number of lots and figure out what the fee is. You take that over to the treasurer's office, you pay the treasurer the $25.00 per lot, and then you get the receipt there and go in Mr. Fentress's office and pay him for the recording of the plat based on a square inch of the plat.

By Mr. Halpern:

Q. And you say you've done this on the very same day by taking it to the various officials to be signed?

A. Yes, sir.

Q. And then recorded your plat?

page 108 } A. Yes, sir.

Q. And you had to pay $25.00 a lot?

A.Yes, sir.

Mr. Halpern: No further questions.

Warner G. Marsh

RECROSS-EXAMINATION

By Mr. Marshall:

Q. Mr. Reasor, are you so intimately familiar with the operations of the various departments of the City that you can testify as to when other actions have necessarily preceded this final review of your plats?

A. I can in a general way, yes, sir. I've been developing in the City of Virginia Beach for twenty years. I've recorded probably fifty plats in that length of time.

Q. Are you able to estimate the number of man hours of effort required by City officials of various sorts in reviewing these plats prior to your final approval?

A. I've never attempted to.

Mr. Marshall: Thank you.

Mr. Halpern: Mr. Marsh, will you take the stand.

The Court: This is all for Mr. Reasor?

page 109 } WARNER G. MARSH, called as a witness on behalf of the plaintiffs, having been first sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Halpern:

Q. Will you state your name, please, sir?

A. Warner G. Marsh.

Q. And what is your profession?

A. Professional engineer in the State of Virginia.

Q. And how long have you been so engaged?

A. Twenty-four years.

Q. How many years?

A. Twenty-four years.

Q. Are you familiar with what is required in terms of man hours to approve a subdivision plat, assuming that that's all that's involved: the approval of the plat for recordation? Will you tell us what the planning commission, if you know, looks for or should look for prior to approving the plat?

A. They check it for street names, the street width, the zoning, the size of lots—

The Court: Would you slow down just a min-
page 110 } ute, please?

The Witness: Yes.

The Court: Street widths, you said something—

The Witness: Street names.

The Court: Street names.

The Witness: Whether the lot meets the zoning requirements, the size and area, whether streets will meet the proposed extensions that they have in their planning. I think that's about all.

By Mr. Halpern:

Q. Now, assuming a person is not going any further and all he's going to do is record his plat. Would you say that $25.00 a lot is a reasonable or unreasonable charge for those services?

A. In my opinion it's unreasonable.

Mr. Marshall: Conclusion of the witness.

The Court: Sustained.

Mr. Halpern: He's an expert, if your Honor please, and I've qualified him as such.

The Court: Have you asked him an opinion—

The Witness: This is a hypothetical question.

Mr. Halpern: How else can I establish the unreasonableness of the fee?

page 111 } Mr. Marshall: Your Honor, he's not qualified —excuse me.

The Court: I think you have to lay the grounds.

By Mr. Halpern:

Q. All right. You've been a civil engineer for how many years?

The Court: Mr. Halpern, let me just ask—do you know everything that the planning commission has to do before finally approving a plat? You've given us—named some of the procedures and the, oh, checks they have to make.

The Witness: You have to clarify that as from just the final plat or preliminary plat. I can tell you the procedures that you start from the ground up.

Mr. Halpern: Your Honor, may I make a statement? We're concerned only with what the City has to do to approve a subdivision plat for recordation, not with what a man might do if he develops land. That's an entirely different situation. It involves extra fees under different ordinances. And under Ordinance number 230 and the old Ordinance 105

page 112 } we're only concerned with what has to be checked

in order to approve a plat for recordation; not for development of the land. And that's the distinction that Mr. Marshall doesn't want me to make.

The Court: I'm not concerned with anything after recordation of this plat, but this ordinance only deals with what is necessary before the plat can be—

Mr. Halpern: Recorded. That's all that ordinance deals with.

The Court: Well, the fee is imposed for the purpose of the examination and approval of final subdivision plats.

Mr. Halpern: That's correct.

The Court: Paragraph 1, paragraph 2 provides that the clerk shall not record a subdivision plat—subdivision plat unless presented a receipt from the treasurer's office evidencing that the fee as required in paragraph 1 has been paid. So the reasonableness of the fee depends upon its relationship to the service provided by the City in the examination and approval of the final subdivision plat.

Mr. Halpern: But we can't get into what hap-
page 113 } pens after the plat's recorded. A man doesn't have to develop his land.

The Court: I'm not interested in that—

Mr. Halpern: All right.

The Court: —at all.

By Mr. Halpern:

Q. And that's what I'm asking you to confine your answer to.

Mr. Marshall: May I be heard just a minute?

The Court: Yes, sir.

Mr. Marshall: Mr. Halpern is attacking the basis of Ordinance 105 in an effort to show that council at that time was unreasonable or arbitrary or did not take into account the facts. It seems to me that any evidence would have to go back to the circumstances surrounding the adoption of that ordinance, not what this witness might think today is a reasonable fee.

The Court: Well, that's what I'm trying to find out is whether or not—Mr. Marsh is a qualified engineer, but the question is whether or not he's familiar with what the City has to do in order to finally approve the plat before recorda-
tion. I'm not—

page 114 } Mr. Halpern: He's already testified to it.

The Court: He testified what should be done. This is all that should be necessary.

Warner G. Marsh

By Mr. Halpern:

Q. Well, is that what—do you know of your own knowledge what the City does? Have you carried any plats through from their inception in the planning commission and walked them through until they're signed by all the necessary officials?

A. I haven't walked them through each individual department, no, sir, one plat right on through. I've either taken it to one and then I've left it there for them to carry through there.

Q. And how long has that taken?

A. It varies. Sometimes I get them back the next day. Sometimes I get them back within a week.

Q. And do you make any certifications as an engineer to the City with reference to subdivision plats?

A. They're signed, yes, sir.

Q. Pardon?

A. They're signed on the—the plats are signed by the surveyor.

Q. And do you know whether or not the City relies upon your certifications?

page 115 } A. Yes, sir, they certify that they approved the plat and they do no—I think I got a little note I have to read. Says five signatures required from the Health Department, Planning Director, the City Engineer, the Superintendent of Streets and Highways, the Director of Public Works. And they approve the plat. They say, "The undersigned certify that the subdivision as it appears on this plat conforms to the applicable regulations related to the subdivision . . . and is approved. By such approval the undersigned do not certify as to the correctness of the boundaries, streets, and other lines shown in this plat."

Q. So, in other words, they accept your drawing of the plat?

A. Accept our work, yes, sir.

Q. And is the checking that they do visual or is it mechanically—

A. Visual.

Q. And how long does it take if you are not going to develop your land and all you're going to do is record your plat, if you are not going to provide off-site improvement and all you want to do is record your plat?

A. If you can find the official there that has to sign it it will take about twenty minutes to half an hour.

Q. Now, are you familiar with what an en-

page 116 } gineer should charge for that work? What would be a fair fee?

A. Yes, sir.

Q. What would be a fair fee for approving a plat?

A. Depending on the number of lots. Do you mean to actually do the mechanics of the calculations of the lot and the drawing that's submitted?

Q. No, I'm talking about what would be a fair price for the charge of a city in approving—inspecting and approving the subdivision plat—

Mr. Marshall: I object to this question.

By Mr. Halpern:

Q. —where you merely record your plat and do not develop your land.

The Court: Wait just a minute.

Mr. Marshall: I object to his question, your Honor.

The Court: On what grounds?

Mr. Marshall: He's asking what would be a fair fee for the City to charge. And I don't think he's shown the—one, that he knows everything the City's doing and, two, what the City's costs are and what the fair—

The Court: I think your objection goes to the
page 117 } weight of the testimony, not to its admissibility.
All right. Objection overruled. Note his exception to the court's ruling.

You may answer the question.

A. In my opinion, a fair fee for that service is $25.00 a plat.

By Mr. Halpern:

Q. A plat?

A. Yes, sir. It's my opinion.

Q. Are you familiar with the charges of abutting municipalities for the approval of plats?

A. Yes, sir, I was assistant county engineer for four years and city engineer for a year.

The Court: County engineer for what county?

The Witness: Hillsborough County in Tampa, Florida, third largest county in the State of Florida.

Mr. Marshall: I think this is irrelevant, your Honor.

Mr. Halpern: I'm talking about Virginia, the adjoining cities in Virginia.

Warner G. Marsh

The Court: Virginia?
Mr. Halpern: Yes.
The Court: To my knowledge there's no fee
page 118 } charged.

By Mr. Halpern:
Q. Is any charged by the City of Norfolk?
A. No, sir.
Q. By the City of Chesapeake?
A. Not to my knowledge, no, sir.
Q. You draw plats for the City of Chesapeake, do you not, as an engineer?
A. Yes, sir.

Mr. Halpern: No further questions.

CROSS-EXAMINATION

By Mr. Marshall:
Q. Mr. Marsh, you've been testifying with respect to the procedure after when you bring a piece on something like this—the final plat down to get the signatures.
A. Yes, sir.
Q. And you testified that that doesn't take very long if you find the right people.
A. Right.
Q. How many months of work go with the planning commission in the engineering department? What works
page 119 } did it take to get to that final stage in the average plat?
A. You mean how long it takes me?
Q. You have—you confer with the various city officials at the office prior to that?
A. Yes, sir.
Q. And over what period of time? Average?
A. After I make my preliminary we submit it to the planning commission for their approval. And this could take—you can get sort of a tentative approval by getting with the staff in an hour and then submitting it to them after that, and you might can get an answer back probably within a day to two weeks.
Q. Buy you have no idea what they're doing in order to come up with their approval, do you?
A. No, sir.
Q. Then you are not in a position to answer what's reasonable.

A. I'm not standing right with them, no, sir.

Mr. Halpern: But that work, Mr. Marshall, is talking about deals with off-site improvements, isn't it?

Mr. Marshall: I don't think he can answer the question. He said he doesn't know what they're doing.

page 120 } REDIRECT EXAMINATION

By Mr. Halpern:

Q. You don't know?

A. Not off-site, no, sir.

Q. Does it have to do with drainage or items of that nature or—

Mr. Marshall: Mr. Halpern—

By Mr. Halpern:

Q. —or factors dealing with the development of the land?

Mr. Marshall: Mr. Halpern, I object to the question. He stated he didn't know what they were doing.

The Court: Gentlemen, let the witness answer the question.

Do you know?

The Witness: What they're doing after I deliver it to them?

The Court: Yes, sir.

The Witness: I don't, sir.

By Mr. Halpern:

Q. You don't know what they're doing? What
page 121 } do they charge for the—what work do they do
with reference to that charge?

A. They—what work do they do? They review it, as far as the street width, the alignment, and the size of the lots.

Q. And how much do they charge for that?

A. I have no idea.

Q. You had no idea?

A. Um-um.

Q. Assuming that a builder's not going to develop his land and all he's going to do is record his plat, what is there that they have to check?

The Court: Can he really answer that, Mr. Halpern?

Mr. Halpern: I think he knows.

Warner G. Marsh

By Mr. Halpern:
Q. Do you know what there is to check?

The Court: I said hasn't he already answered it.
Mr. Halpern: I don't recall.
The Court: Yes, sir, he's answered it. The first question you asked.

page 122 } By Mr. Halpern:
Q. Where do they get the figures with reference to the bond required in the event you develop your land?
A. We work up that estimate and submit it to them on a form.
Q. Do they accept that, to your knowledge?
A. Yes, sir.
Q. Have they ever varied from it, to your knowledge?

The Court: Aren't we getting beyond the scope that you wanted to limit this inquiry—
Mr. Halpern: Yes, I would say so. I would say—
The Court: All right. Let's stop.
Mr. Halpern: I would say he's already testified that $25.00 is a fair value for reviewing the plat.
The Court: But you're getting into something that must be done over and beyond what is necessary to record the plat.
Mr. Halpern: That's right. That's what Mr. Marshall is referring to. And I don't think that that has anything to do with what is a fair charge for preparing—reviewing a plat that's prepared by an engineer. That's my point.
page 123 } No further questions.
The Court: Mr. Halpern, how many more witnesses do you have?
Mr. Halpern: I think that's it, your Honor. And we have LuMarRo, which would take a minute.
The Court: We already disposed of LuMarRo.
Mr. Halpern: I thought so. I thought we disposed of it.
The Court: On the Statute of Limitations.
Mr. Halpern: Mr. Marshall thought we ought to stipulate to the motion for judgment so—
Mr. Marshall: I think you misunderstood me, Mr. Halpern.
The Court: How many witnesses do you have Mr. Marshall?
Mr. Marshall: Well, I'd like to make a motion first, your Honor. I move for judgment for the defendant right now on the basis of the evidence submitted.

Warner G. Marsh

The Court: I'm going to sustain the motion. That the burden's upon the—is upon the plaintiff to show that that fee is unreasonable for the services, special services rendered by the City. If they can't carry that burden, then—

page 124 } Mr. Halpern: I note an exception on the grounds that the qualified witness was an engineer of years of experience. He testified that $25.00 was a fair price for reviewing a subdivision plat.

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page 125 }

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Mr. Halpern: I note exception to the court's ruling—

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A Copy—Teste:

Howard G. Turner, Clerk.

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