CLERK
SUPREME COURT OF VIRGINIA
RECEIVED
FEB 26 1980
RECEIVED
RICHMOND, VIRGINIA

223 Va 149

3

IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD NO: 791154

WILLIAM RANDOLPH WRIGHT,
HOWARD E. COPELAND,
HENRY T. COOK,
JACK B. H. DOLLAR,
ALBERT G. HORTON, JR.,
ELIZABETH V. ANDREWS,
H. M. S. RICHARD,
WILLIAM ROBERT WILSON,

Appellants

v.

NORFOLK ELECTORAL BOARD AND
CITY OF NORFOLK,

Appellees

JOINT APPENDIX

Howard E. Copeland, Esquire
Montagna & Copeland
Suite Two, Witchduck Station
5291 Greenwich Road
Virginia Beach, Virginia 23462

Albert Teich, Jr., Esquire
705 Plaza One Building
Norfolk, Virginia 23510

Counsel for the Appellants

Joseph H. Campbell, Esquire
Suite 600
800 East City Hall Avenue
Norfolk, Virginia 23510

Philip R. Trapani, Esquire
908 City Hall Building
Norfolk, Virginia 23501

Counsel for Appellees

LAWYERS PRINTING COMPANY 7th & Franklin Bldg. Richmond, Virginia 23219 (804) 648-3664

TABLE OF CONTENTS

	Appendix Page
Petition for Election and for Popular Initiative filed 3-26-79	1
Representative sample of "Petition of Qualified Voters for Popular Initiative" with proposed ordinance	9
Letter of Hugh L. Stovall, Clerk, dated March 26, 1979	11
Order for Special Election, entered on March 27, 1979, with Appendix	12
Motion to Vacate of Norfolk Electoral Board, filed April 13, 1979	14
Notice of hearing on Motion to Vacate	15
Application for Intervention of City of Norfolk, filed April 16, 1979	16
Order of Court entered April 16, 1979	18
Motion to Vacate of City of Norfolk, filed April 16, 1979	19
Petitioners' Memorandum of Law, filed April 7, 1979	22
Memorandum in Support of the City's Motion to Vacate filed April 16, 1979	38
Petitioners' Reply to the City's Memorandum of Law, filed April 23, 1979	101
Supplemental Memorandum in Support of the City's Motion to Vacate, filed April 25, 1979	127
Excerpts from the transcript of hearing before the Court on April 26, 1979	
Oral Argument before the Court	143
Order of Court entered May 4, 1979	158
Notice of Appeal filed May 8, 1979	159
Order of Court entered May 21, 1979	160
Assignments of Error filed 8-3-79	161

PETITION FOR ELECTION

NOW COMES a committee of petitioners, known as "The Norfolk Tea Party," and petition this Honorable Court to order an initiative election pursuant to Section 32 of the Charter of the City of Norfolk, and represent unto the Court the following facts:

1. The Committee has complied with the requirements of Sections 30 and 31 of the City Charter, having filed its Petition to the Council on November 13, 1978, a true copy of which is attached as an exhibit hereto, with the receipt of the City Clerk thereon; more than 17,000 qualified voters signed said Petition.

2. The Council of the City of Norfolk, pursuant to Section 32 of the City Charter, held public hearings on the proposed ordinance on December 1, 1978, and on December 5, 1978, but failed to adopt the ordinance proposed by the Petition of the Committee, adopting instead a Resolution not addressing or enacting the subject matter of the Petition.

3. This Petition is accompanied by the signatures of more than 10,000 qualified voters of the City of Norfolk on forms comlying with the provisions of the Charter establishing procedure for initiative elections, and are filed herewith.

4. There were approximately 32,052 votes cast in the last councilmanic election of the City of Norfolk, held on May 2, 1978; therefore, the number of signatures filed with the City Clerk greatly exceeded the required number of 3,205 and the number of signatures filed with the Clerk of this Court herewith greatly exceeds the required number of 8,013, and, pursuant to Section 44 of the Charter, are presumed to be genuine signatures of qualified voters.

5. The proposed ordinance is filed herewith as an exhibit.

WHEREFORE, the Committee prays that the Clerk shall certify to the Court that the rquired number of qualified voters have signed the petitions, forthwith, and that the Court shall forthwith enter an Order for a special election upon this initiative.

WITNESS the following signatures and seals:

William Randolph Wright
William Randolph Wright, Chairman
2128 Dean Drive

Howard E. Copeland
Howard E. Copeland, Treasurer
1010 Covington Lane

Henry T. Cook
Henry T. Cook
5508 Sandpiper Lane

Jack B.H. Dollar
Jack B.H. Dollar
846 Lesner Avenue

Albert G. Horton Jr.
Albert G. Horton, Jr.
8409 Norristown Drive

Elizabeth V. Andrews
Elizabeth V.Andrews
9623 Sturgis Street

H. Mark S. Richard
Dr. H.M.S. Richard
3767 Drennan Avenue

William Robert Wilson
William Robert Wilson
1605 Beaumont Court

Filed 3-26-78 Hugh L. Stowell Clerk

STATE OF VIRGINIA

CITY OF NORFOLK, to-wit:

Subscribed and sworn to before me this 25th day of March, 1979.

Anthony J. Scarola
Notary Public

My Commission Expires:

Sept 12, 1981

FILMED

BE IT ORDAINED by the Council of the City of Norfolk:

869

Section 1:- That, effective on and after July 1, 1979, Section 1, as amended by Ordinance No. 28,932, of Ordinance No. 24,116, entitled "An Ordinance Imposing And Levying A Tax For The Calendar Year Beginning January 1, 1968, And Ending December 31, 1968, And Also For Each And Every Calendar Year Thereafter Beginning January 1 And Ending December 31 Of Each Such Year, Unless Otherwise Changed By The Council, On Real Estate Within The City Of Norfolk", and adopted by Council on November 28, 1967, is hereby amended and reordained to read as follows:

Section 1:- (1) That for the fiscal year beginning July 1, 1979, and ending June 30, 1980, and also for each and every fiscal year thereafter beginning July 1 and ending June 30 of each such year, unless otherwise changed by the Council or law, there is hereby imposed and levied the following tax on real estate, other than real estate of public service companies which is assessed by the State Corporation Commission at other than its fair market value and not adjusted thereto as provided by law, within the City of Norfolk:

REAL ESTATE

On all lands, wharves and lots, and the improvements thereon, not exempt from taxation, there shall be a tax of one dollar and fifteen cents ($1.15) for every one hundred dollars of assessed valuation thereon.

(2) That for the calendar year beginning January 1, 1977, and ending December 31, 1977, unless otherwise changed by the Council or law, there is hereby imposed and levied the following tax on real estate of public service companies, which is assessed by the State Corporation Commission at other than its fair market value and not adjusted thereto as provided by law, within the City of Norfolk:

REAL ESTATE

On all lands, wharves and lots, and the improvements thereon, not exempt from taxation, from January 1, 1977, through June 30, 1977, there shall be levied a tax of two dollars and seventy cents ($2.70) for every one hundred dollars of assessed valuation thereof, and from July 1, 1977, through December 31, 1977, there shall be levied a tax of four dollars ($4.00) for every one hundred dollars of assessed valuation thereof.

(3) That for the caleandar year beginning January 1, 1978, and ending December 31, 1978, and also for each and every calendar year thereafter beginning January 1 and ending December 31 of each such year, unless otherwise changed by the Council or law, there is hereby imposed and levied the following tax on the real estate of public service companies, which is assessed by the State Corporation Commission at other than its fair market value, and not adjusted thereto as provided by law, within the City of Norfolk:

REAL ESTATE

On all lands, wharves and lots, and the improvements thereon, not exempt from taxation, there shall be levied a tax of four dollars ($4.00) for every one hundred dollars of assessed valuation thereof.

Section 2:- That this ordinance shall be in effect from and after July 1, 1979.

PETITION FOR POPULAR INITIATIVE

We, the undersigned qualified voters of the City of Norfolk, Virginia, do hereby petition the Council of the City of Norfolk, pursuant to Section 30 of the City Charter, to amend Ordinance Number 28,932, adopted May 24, 1977, to reduce the real estate tax rate of the City of Norfolk to $1.15 per $100.00 assessed value, effective July 1, 1979. Attached hereto, and constituting one instrument herewith, are Petitions for the aforesaid initiative proposal signed by more than the required number of qualified voters of the City of Norfolk, and the proposed Ordinance in full, set forth in writing on the reverse side of each page of the petitions of voters. The undersigned and others listed below constitute a committe of the petitioners, known as "The Norfolk Tea Party," and so designated in its "Statement of Organization For A Committee," filed with the State Board of Elections.

GIVEN UNDER OUR HANDS, and filed with the City Clerk, this 13th day of November, 1978:

William Randolph Wright
William Randolph Wright, Chairman
2128 Dean Drive, Norfolk, Virginia

Howard E. Copeland
Howard E. Copeland, Treasurer
1010 Covington Lane, Norfolk, Va.

Henry T. Cook, 5508 Sandpiper Lane

Jack B.H. Dollar, 846 Lesner Ave.

Albert G. Horton, Jr.
Albert G. Horton, Jr., 8409 Norristown Drive

Elizabeth V. Andrews
Elizabeth V. Andrews, 9623 Sturgis Street

Additional Committee Members:

Dr. H.M.S. Richard, 3767 Drennan Avenue

William Robert Wilson, 1605 Beaumont Court

Receipt of the original Petition and attached documents bearing signatures and a proposed ordinance is hereby acknowledged and said documents are hereby filed as one instrument, this 13th day of November, 1978.

City Clerk

BE IT ORDAINED by the Council of the City of Norfolk:

Section 1:- That, effective on and after July 1, 1979, Section 1, as amended by Ordinance No. 28,932, of Ordinance No. 24,116, entitled "An Ordinance Imposing And Levying A Tax For The Calendar Year Beginning January 1, 1968, And Ending December 31, 1968, And Also For Each And Every Calendar Year Thereafter Beginning January 1 And Ending December 31 Of Each Such Year, Unless Otherwise Changed By The Council, On Real Estate Within The City Of Norfolk", and adopted by Council on November 28, 1967, is hereby amended and reordained to read as follows:

Section 1:- (1) That for the fiscal year beginning July 1, 1979, and ending June 30, 1980, and also for each and every fiscal year thereafter beginning July 1 and ending June 30 of each such year, unless otherwise changed by the Council or law, there is hereby imposed and levied the following tax on real estate, other than real estate of public service companies which is assessed by the State Corporation Commission at other than its fair market value and not adjusted thereto as provided by law, within the City of Norfolk:

REAL ESTATE

On all lands, wharves and lots, and the improvements thereon, not exempt from taxation, there shall be a tax of one dollar and fifteen cents ($1.15) for every one hundred dollars of assessed valuation thereon.

(2) That for the calendar year beginning January 1, 1977, and ending December 31, 1977, unless otherwise changed by the Council or law, there is hereby imposed and levied the following tax on real estate of public service companies, which is assessed by the State Corporation Commission at other than its fair market value and not adjusted thereto as provided by law, within the City of Norfolk:

REAL ESTATE

On all lands, wharves and lots, and the improvements thereon, not exempt from taxation, from January 1, 1977, through June 30, 1977, there shall be levied a tax of two dollars and seventy cents ($2.70) for every one hundred dollars of assessed valuation thereof, and from July 1, 1977, through December 31, 1977, there shall be levied a tax of four dollars ($4.00) for every one hundred dollars of assessed valuation thereof.

(3) That for the caleandar year beginning January 1, 1978, and ending December 31, 1978, and also for each and every calendar year thereafter beginning January 1 and ending December 31 of each such year, unless otherwise changed by the Council or law, there is hereby imposed and levied the following tax on the real estate of public service companies, which is assessed by the State Corporation Commission at other than its fair market value, and not adjusted thereto as provided by law, within the City of Norfolk:

REAL ESTATE

On all lands, wharves and lots, and the improvements thereon, not exempt from taxation, there shall be levied a tax of four dollars ($4.00) for every one hundred dollars of assessed valuation thereof.

Section 2:- That this ordinance shall be in effect from and after July 1, 1979.

Elizabeth Andrews
587-5542

THE NORFOLK TEA PARTY

PETITION OF QUALIFIED VOTERS FOR POPULAR INITIATIVE

We, the undersigned qualified and registered voters of the City of Norfolk, Virginia, hereby petition the Circuit Court of the City of Norfolk, pursuant to City Charter Sections 30 through 33, to order an initiative election of registered voters of the City of Norfolk, to determine whether ORDINANCE NO. 28,932, adopted May 24, 1977, should be amended to reduce the real estate rate to $1.15 per $100 assessed value effective July 1, 1979, as provided in the Ordinance appearing in full text on the reverse side of this petition.

GIVEN UNDER OUR HANDS:

SIGNATURE OF REGISTERED VOTER	NAME (Please Print)	RESIDENT ADDRESS	DATE
1. Jesse T Weil Jr	Jesse T Weil Jr	410 Farrell St	2/22/79
2. Ethel N. Weil	Ethel N. Weil	410 Farrell St.	2-22-79
3. Louise J. Shattuck	LOUISE J SHATTUCK	411 FARRELL ST	2-22-79
4. Fannie M. Parker	FANNIE M. PARKER	405 FARRELL ST Va	2-22-79 587-9335
5. Alton B. Goehring	ALTON B. GOEHRING	404 Farrell St.	2-22-79
6. Grace B. Bryant	GRACE B BRYANT	328 Farrell St.	2-22-79
7. Elaine Branson	ELAINE BRANSON	323 CARSTER ST.	2.22.79
8. Beulah Jr. Kothwell	Beulah Jr Kothwell	311 E Chester St.	2-22-79
9. Marjorie J. Leamon	Marjorie J. Leamon	235 E. Chester St	2-22-79
10. George Tebault	GEORGE TEBAULT	230 E CHESTER	2-22-79
11. Mabel Tebault	MABEL TEBAULT	230 E CHESTER ST	2-22-79
12. Eunice Putnam	EUNICE PUTNAM	308 Twilley St	2-22-79
13. Fe Mendoza	Fe B. MENDOZA	316 TWILLEY ST	2/22/79
14. George Mendoza	GEORGE Mendoza	316 Twilley St	2/22/79
15. James W Anderson	JAMES W ANDERSON	9812 Tidewater	2/22/79
16. Kella D. Turner	KELLA D. TURNER	324 FARRELL ST	2/22/78
17. Kella D Turner	KELLA D TURNER	329 FARRELL ST	2/22/78
18. Viki L Tarkington	VIKI R. TARKINGTON	8810 TIDEWATER	2/22/78
19. Joann F. Krumm	Joann F. Krumm	406 Farrell St	2/22/79
20. Robert W. Garrett	ROBERT W. GARRETT	415 - FARRELL ST	2/22/79
21. Peggy A. Garrett	Peggy A. GARRETT	415 FARRELL ST.	2/22/79
22. John P Shattuck Jr	JOHN. P. SHATTUCK. JR	411 FARRELL ST	2/22/79
23. Howard S. Moore	Howard S. Moore	409 Farrell St	2/22/79
24. Jean Moore	JEAN E MOORE	409 FARRELL ST	2/22/79
25. Frances D Angelson	FRANCES D. ANGELSON	412 FARRELL ST	2/22/79

AFFIDAVIT

State of Virginia,
City of Norfolk, to-wit:

I, ANTHONY J. SCARANGELLA, a Notary Public in and for the CITY OF NORFOLK in the Commonwealth of Virginia, do certify that Elizabeth V. Andrews appeared before me in my PRESENCE aforesaid and made oath before me that each signature appearing herein is the genuine signature of the person indicated and that such signatures were made in the presence of the affiant on the date indicated.

My commission expires on the 12 day of Sept, 19[illegible]. Given under my hand this 13 day of Mar., 19 [illegible].

Notary Public

Return petition to this address: By authority of
Howard E. Copeland, Treasurer
The Norfolk Tea Party
1010 Covington Lane
Norfolk, VA 23508

25

BE IT ORDAINED by the Council of the City of Norfolk:

Section 1:- That, effective on and after July 1, 1979, Section 1, as amended by Ordinance No. 28,932, of Ordinance No. 24,116, entitled "An Ordinance Imposing And Levying A Tax For The Calendar Year Beginning January 1, 1968, And Ending December 31, 1968, And Also For Each And Every Calendar Year Thereafter Beginning January 1 And Ending December 31 Of Each Such Year, Unless Otherwise Changed By The Council, On Real Estate Within The City Of Norfolk" and adopted by Council on November 28, 1967, is hereby amended and reordained to read as follows:

Section 1:- (1) That for the fiscal year beginning July 1, 1979, and ending June 30, 1980, and also for each and every fiscal year thereafter beginning July 1 and ending June 30 of each such year, unless otherwise changed by the Council or law, there is hereby imposed and levied the following tax on real estate, other than real estate of public service companies which is assessed by the State Corporation Commission at other than its fair market value and not adjusted thereto as provided by law, within the City of Norfolk:

REAL ESTATE

On all lands, wharves and lots, and the improvements thereon, not exempt from taxation, there shall be a tax of one dollar and fifteen cents ($1.15) for every one hundred dollars of assessed valuation thereon.

(2) That for the calendar year beginning January 1, 1977, and ending December 31, 1977, unless otherwise changed by the Council or law, there is hereby imposed and levied the following tax on real estate of public service companies, which is assessed by the State Corporation Commission at other than its fair market value and not adjusted thereto as provided by law, within the City of Norfolk:

REAL ESTATE

On all lands, wharves and lots, and the improvements thereon, not exempt from taxation, from January 1, 1977, through June 30, 1977, there shall be levied a tax of two dollars and seventy cents ($2.70) for every one hundred dollars of assessed valuation thereof, and from July 1, 1977, through December 31, 1977, there shall be levied a tax of four dollars ($4.00) for every one hundred dollars of assessed valuation thereof.

(3) That for the caleandar year beginning January 1, 1978, and ending December 31, 1978, and also for each and every calendar year thereafter beginning January 1 and ending December 31 of each such year, unless otherwise changed by the Council or law, there is hereby imposed and levied the following tax on the real estate of public service companies, which is assessed by the State Corporation Commission at other than its fair market value, and not adjusted thereto as provided by law, within the City of Norfolk:

REAL ESTATE

On all lands, wharves and lots, and the improvements thereon, not exempt from taxation, there shall be levied a tax of four dollars ($4.00) for every one hundred dollars of assessed valuation thereof.

~~in an unconstitutional manner, and any such decision shall not affect the validity of the remaining portions of this ordinance.~~

Section 2:- That this ordinance shall be in effect from and after July 1, 1979.

010 B

ED 13

FOURTH JUDICIAL CIRCUIT

CIRCUIT COURT OF THE CITY OF NORFOLK

HUGH L. STOVALL, CLERK

100 ST. PAUL'S BOULEVARD
NORFOLK, VIRGINIA 23510

March 26, 1979

The Honorable John P. Harper, Chief Judge
The Honorable Spencer G. Gill, Jr.
The Honorable Wm. Moultrie Guerry
The Honorable Morris B. Gutterman
The Honorable Thomas R. McNamara
The Honorable Edward L. Ryan, Jr.
The Honorable Alfred W. Whitehurst
The Honorable John W. Winston
The Honorable Robert W. Stewart
Judges of the Circuit Court of the City of Norfolk, Va.

Gentlemen:

This is to certify that I have personally examined the attached petitions filed with me on the 26th day of March, 1979 by Mr. Howard E. Copeland, Attorney for the Petitioners, known as "The Norfolk Tea Party", and presume that there are, as required by the City Charter, a sufficient number of signatures of qualified voters.

Sincerely,

Hugh L. Stovall

Hugh L. Stovall
Clerk
Circuit Court of the
City of Norfolk, Va.

HLS:A
Attachments

ORDER FOR SPECIAL ELECTION

THIS DAY CAME a Committee of Petitioners as defined by Section 30 of the Charter of the City of Norfolk, and petitioned the Court to order a special election upon an initiative proposal which is the subject of the papers filed with the Petition of the Committee.

UPON CONSIDERATION WHEREOF, it appearing to the Court that all the requirements of Sections 30, 31, and 32 of the Charter of the City of Norfolk have been satisfied by the Committee; that the Council of the City of Norfolk has not adopted and enacted the Ordinance proposed by the Committee in its Petitions addressed first to the Council and now to this Court within the time provided by Section 32 of the Charter; that the Petition filed herein bears the signatures of more than the number required by the Charter as certified by the Clerk of this Court and upon the presumption under the Charter that said signatures are the genuine signatures of qualified voters; it is, accordingly

ADJUDGED, ORDERED, and DECREED that the Board of Elections of the City of Norfolk shall conduct an INITIATIVE ELECTION on the 15th day of MAY, 1979, upon the question stated in the Appendix to this Order, said Board shall report the results of said election to the City Clerk and Council, and the results shall be binding upon the City of Norfolk, determining whether the Ordinance proposed in the Appendix shall be enacted or shall fail to be enacted.

ENTER: 3/27/79

JUDGE

I ask for this:

Francis E. Ozeland

A P P E N D I X

Initiative Proposition To Be Presented On The Ballot:

QUESTION: Shall The Real Estate Tax Rate Of The City Of Norfolk Be Reduced From $1.62 Per $100 Assessed Valuation To $1.15 Per $100 Assessed Valuation?

☐ Yes

☐ No

A majority of "Yes" votes shall have the effect of enacting the following proposed Ordinance of the City of Norfolk:

FILMED

BE IT ORDAINED by the Council of the City of Norfolk:

Section 1:- That, effective on and after July 1, 1979, Section 1, as amended by Ordinance No. 28,932, of Ordinance No. 24,116, entitled "An Ordinance Imposing And Levying A Tax For The Calendar Year Beginning January 1, 1968, And Ending December 31, 1968, And Also For Each And Every Calendar Year Thereafter Beginning January 1 And Ending December 31 Of Each Such Year, Unless Otherwise Changed By The Council, On Real Estate Within The City Of Norfolk", and adopted by Council on November 28, 1967, is hereby amended and reordained to read as follows:

Section 1:- (1) That for the fiscal year beginning July 1, 1979, and ending June 30, 1980, and also for each and every fiscal year thereafter beginning July 1 and ending June 30 of each such year, unless otherwise changed by the Council or law, there is hereby imposed and levied the following tax on real estate, other than real estate of public service companies which is assessed by the State Corporation Commission at other than its fair market value and not adjusted thereto as provided by law, within the City of Norfolk:

REAL ESTATE

On all lands, wharves and lots, and the improvements thereon, not exempt from taxation, there shall be a tax of one dollar and fifteen cents ($1.15) for every one hundred dollars of assessed valuation thereon.

(2) That for the calendar year beginning January 1, 1977, and ending December 31, 1977, unless otherwise changed by the Council or law, there is hereby imposed and levied the following tax on real estate of public service companies, which is assessed by the State Corporation Commission at other than its fair market value and not adjusted thereto as provided by law, within the City of Norfolk:

REAL ESTATE

On all lands, wharves and lots, and the improvements thereon, not exempt from taxation, from January 1, 1977, through June 30, 1977, there shall be levied a tax of two dollars and seventy cents ($2.70) for every one hundred dollars of assessed valuation thereof, and from July 1, 1977, through December 31, 1977, there shall be levied a tax of four dollars ($4.00) for every one hundred dollars of assessed valuation thereof.

(3) That for the caleandar year beginning January 1, 1978, and ending December 31, 1978, and also for each and every calendar year thereafter beginning January 1 and ending December 31 of each such year, unless otherwise changed by the Council or law, there is hereby imposed and levied the following tax on the real estate of public service companies, which is assessed by the State Corporation Commission at other than its fair market value, and not adjusted thereto as provided by law, within the City of Norfolk:

REAL ESTATE

On all lands, wharves and lots, and the improvements thereon, not exempt from taxation, there shall be levied a tax of four dollars ($4.00) for every one hundred dollars of assessed valuation thereof.

Section 2:- That this ordinance shall be in effect from and after July 1, 1979.

MOTION TO VACATE

Now comes the Norfolk Electoral Board, a party at interest in the above-captioned matter, by counsel, and moves that the Court vacate an Order for Special Election, heretofore entered on March 29, 1979, as improvidentially granted.

NORFOLK ELECTORAL BOARD

By Lawrence C. Lawless
Lawrence C. Lawless
Deputy Commonwealth's Attorney

CERTIFICATE

I hereby certify that copies of the above motion to vacate were delivered to Howard E. Copeland, Esq. and Phillip R. Trapani, Esq., attorney for parties at interest in the above-captioned matter on this 13th day of April, 1979.

Lawrence C. Lawless
Lawrence C. Lawless

NOTICE

Take notice that at 10:00 a.m. on Monday, April 16, 1979, or as soon thereafter as counsel may be heard, the Norfolk Electoral Board will petition the Honorable Morris B. Gutterman, Judge of the Circuit Court of the City of Norfolk, to vacate an Order for Special Election heretofore filed in the above-captioned matter.

NORFOLK ELECTORAL BOARD

By Lawrence C. Lawless
Lawrence C. Lawless
Deputy Commonwealth's Attorney

APPLICATION FOR INTERVENTION

Comes now the City of Norfolk, by counsel, and asks this Court for leave to intervene in the above matter, pursuant to Rule 2:15 of the Rules of the Virginia Supreme Court, and for its application for intervention respectfully represents as follows:

1. That the City of Norfolk, hereinafter referred to as "City," is a municipal corporation, organized and chartered under the laws of the State of Virginia.

2. That the City may, by leave of Court, intervene in said matter, as provided in Rule 2:15 of the Rules of the Virginia Supreme Court, so as to assert by petition any claim or defense germane to any subject matter pending before the Court.

3. That the City has a direct, substantial and compelling interest in the holding of an Initiative Election, ordered by this Court to be held on May 15, 1979, for the purpose of submitting to popular vote a proposed reduction of the City's Real Estate Tax Rate from $1.62 per $100 assessed valuation to $1.15 per $100 assessed valuation, in that the functions, obligations and budget of the City will clearly be affected by the outcome of said election.

4. That the City, without intervention, cannot adequately protect its interests.

5. That a full and complete determination of the propriety of holding said election cannot be made without intervention of the City.

CITY OF NORFOLK

6. That the City has been noticed by the Norfolk Tea Party by receipt therefrom of its original Petition for said election, the said Order of the Court, and said Norfolk Tea Party's Memorandum of Law in support thereof.

7. That the proposed Motion to Vacate this Court's Order of Election is attached hereto, wherein the City sets forth the grounds upon which said Motion may be granted.

WHEREFORE, petitioner City prays for leave to intervene, as a party in the matter of the Initiative Election, and for leave to file its proposed Motion to Vacate, and for other and further relief as the Court may deem proper.

CITY OF NORFOLK

By _____
Philip R. Trapani
City Attorney

Philip R. Trapani
City Attorney
R. Barrow Blackwell
Assistant City Attorney
Mary L. G. Nexsen
Assistant City Attorney
908 City Hall Building
Norfolk, Virginia 23501

Of counsel for the City of Norfolk

I hereby certify that a true copy of the foregoing Application For Intervention was mailed and/or hand-delivered to Lawrence C. Lawless, Deputy Commonwealth's Attorney, 600 E. City Hall Avenue, Norfolk, Virginia 23510, and to Howard E. Copeland, Esquire, 5291 Greenwich Road, Virginia Beach, Virginia 23462, this 16th day of April, 1979.

_____
Philip R. Trapani
City Attorney

CITY OF NORFOLK

Virginia:

In the Circuit Court of the City of Norfolk, on the 16th *day of* April *, in the year 19* 79

Chancery No. C-431-79A

IN RE: INITIATIVE ELECTION

ORDER

This day came the City of Norfolk, heretofore granted leave to intervene, by counsel, the Norfolk Electorial Board by counsel, and the Committee of Petitioners, by counsel, and after hearing on the above matter, and for good cause shown, it is ORDERED that the Order for Special Election, and the execution thereof, entered by this Court on March 27th, 1979, be and is hereby stayed and suspended pending further hearing hereon.

Entered on the 16th day of April, 1979

Morris B. Gutterman
Judge

MOTION TO VACATE

Comes now your movant, City of Norfolk, as intervenor, by counsel, and moves this Court to vacate its Order of Election, entered on the 27th day of March, 1979, for the reasons and on the grounds as hereinafter set forth:

1. That in Virginia the plenary power of taxation is an inherent power of the General Assembly limited only by Article X of the Constitution. This inherent power may be provided to county, city, town and regional governments as authorized by Article VII, Section 2 of the Constitution and to no other. Once granted to a city, the power to impose taxes can only be accomplished by the governing body of that city in accordance with the provisions of Article VII, Section 7 of the Constitution.

2. That the City of Norfolk, hereinafter called the "City," has been granted leave to intervene in the above matter as an interested party, upon application filed prior hereto.

3. That the initiative and referendum procedures of the Norfolk Charter, Sections 30 through 32, inclusive (copies of which are attached), are superseded by State election law, Title 24.1, Chapter 7, inter alia, Section 24.1-165, Code of Virginia, (1950), as amended, under which submission of the Committee of Petitioners' proposed ordinance to the voters of the City is prohibited.

4. That the City's tax rate ordinance is an administrative act of the Council, not subject to the initiative procedures of said Charter. Whitehead v. H & C Development Corp., 204 Va. 144 (1963).

5. That the requisite number and qualification of the voters whose names appear on the said Committee's Petition for Election have not been ascertained and certified by the

CITY OF NORFOLK

Clerk of this Court in accordance with Section 32 of the said Charter.

6. That the holding of said Initiative Election on May 15, 1979, forty-nine days after entry of the Court's Order on March 27, 1979, fixing the date for said election is prohibited by controlling general law, Section 24.1-165, Code of Virginia (1950), as amended, requiring that no such election be held unless it shall have been ordered at least sixty days prior to the date for which it is called.

7. That the holding of said Initiative Election on May 15, 1979, twenty-eight days prior to a scheduled statewide primary election on June 12, 1979, is prohibited by controlling general law, Section 24.1-165, Code of Virginia (1950), as amended, prohibiting the holding of said Initiative Election within sixty days prior to a general or primary election.

8. That the proposed ordinance of said committee contains no title as required by law, and cannot be legally adopted by the voters.

WHEREFORE, the City of Norfolk, recognizing that its Council is responsible to its public and is charged with upholding the provisions of said Charter and the general laws of the Commonwealth, and believing, on advice of counsel, that the initiative process is legally inappropriate in the instant case, prays that this Court vacate its Order of Election entered on March 27, 1979, and grant such other and further relief as may be appropriate.

CITY OF NORFOLK

By _____
Philip R. Trapani
City Attorney

CITY OF NORFOLK

Philip R. Trapani
City Attorney
R. Barrow Blackwell
Assistant City Attorney
Mary L. G. Nexsen
Assistant City Attorney
908 City Hall Building
Norfolk, Virginia 23501

Of counsel for the City of Norfolk.

I hereby certify that a true copy of the forexoing Motion to Vacate was mailed and/or hand-delivered to Lawrence C. Lawless, Deputy Commonwealth's Attorney, 600 E. City Hall Avenue, Norfolk, Virginia 23510, and to Howard E. Copeland, Esquire, 5291 Greenwich Road, Virginia Beach, Virginia, 23462, this _____ day of April, 1979.

_____
Philip R. Trapani
City Attorney

CITY OF NORFOLK

PETITIONERS' MEMORANDUM OF LAW

NOW COMES a Committee of Petitioners and submits the following Memorandum of Law, in order to clarify certain legal issues of interest to this Honorable Court and to the parties interested in the calling of the election addressed by the Order entered heretofore in this matter.

THE STATEMENT OF THE CASE

The Committee filed its verified petition, with supporting exhibits and petitions signed by more than 10,000 qualified voters of the City of Norfolk, on March 26, 1979. Pursuant to Section 32 of the Charter of the City of Norfolk, the Clerk of this Court ascertained and certified on March 27, 1979, that the required number of qualified voters had signed the said petitions. Upon receipt of the Clerk's Certificate, and pursuant to the aforesaid Section of the City Charter, the Committee presented its Petition, said Certificate, and a proposed Order for Special Election to a Judge of this Court on the same date. The Judge forthwith entered the Order as required by the aforesaid Section of the Charter, setting Tuesday, May 15, 1979, as the date for a Special Election upon the Initiative presented by the Committee, which date is "not less than thirty nor more than sixty days after the date of the entering of said Order." It is contemplated that the Clerk of the

Court shall cause the proposed Ordinance to be published once in one or more newspapers of general circulation published in this City at least ten days before the said election date.

The Board of Elections of the City of Norfolk has informally presented to the Court its concern that the provisions of the City Charter with regard to Initiative Elections are in conflict with Section 24.1-165 of the Code of Virginia (1950, as amended), and that the date set by the Order of this Court conflicts with two prohibitions of said statute. Since the Charter and Statute appear to be in direct conflict and not able to be harmonized, the question is presented as to which enactment of the General Assembly of Virginia controls the present case. The local Board of Elections has sought guidance from the Court as to whether it will be required to conduct the election presently set for May 15, 1979, or on some subsequent date, so that proper advance preparations may be made for the proposed election.

This Memorandum of Law has been prepared to advise the Court and all interested parties that the Committee of Petitioners cannot agree to any date more than sixty days after the entry of the Order dated March 27, 1979, and request that the said Order not be amended or disturbed, since it was properly and validy entered; upon the grounds hereinafter stated. A copy of this Memorandum of Law is being promptly provided to the interested parties stated in the

Certificate so that they may be advised of the position of the Committee of Petitioners. This Memorandum does not presume to address the question of whether the subject matter of the proposed Initiative Election is proper, because that issue has not been raised, but the Committee will present its authority on that subject at such time as it is required.

THE QUESTIONS PRESENTED

I. IS THE NORFOLK CITY CHARTER PRESUMED TO BE PROPERLY ENACTED, CONSTITUTIONAL, AND VALID?

II. DOES NORFOLK CITY CHARTER SECTION 32 VIOLATE VIRGINIA CONSTITUTION ARTICLE IV, SECTION 14 (11) ?

III. DOES THE SPECIAL ACT OF THE GENERAL ASSEMBLY (THE CHARTER) OR THE GENERAL ACTS OF THE SAME LEGISLATURE (THE STATUTE) PREVAIL WHEN THEY CONFLICT ?

ARGUMENT

I. ALL ACTS OF THE GENERAL ASSEMBLY, INCLUDING CHARTERS, ARE PRESUMED TO BE PROPERLY ENACTED, CONSTITUTIONAL AND VALID.

It is a cardinal principle of statutory construction that "there is a prima facie presumption that the Charter or an amendment thereof was enacted in the manner required by the Constitution, and that the rights and powers conferred are within the legislative power to grant." Portsmouth v. Weiss, 145 Va. 94 (1926); Ransone v. Craft, 161 Va. 332 (1933); City of Colonial Heights v. Loper, 208 Va. 580 (1968). No party has entered this proceeding to challenge the constitutionality of Section 32 of the Norfolk City Charter, or to suggest that it was not enact-

ed in the manner prescribed by Article VII, Section 2, of the Constitution of Virginia (1971). Therefore, the entire Norfolk City Charter is clothed with the presumption of constitutional validity. Yet, a discussion and analysis of certain apparent conflicts with provisions of the Constitution of Virginia is instructive in deciding the conflict between the Charter and general state law.

II. NORFOLK CITY CHARTER SECTION 32 DOES NOT VIOLATE ARTICLE IV, SECTION 14 (11) OF THE CONSTITUTION OF VIRGINIA.

A. A special Act granting "the authority to order an election" is not within the constitutional meaning of "a law for registering voters, conducting elections, or designating the places of voting."

When Norfolk's sister city, Virginia Beach, was formed, its Charter conflicted with general state law as to the frequency with which the governing body was required to reapportion itself. In the case of Davis v. Dusch, 205 Va. 676, 684 (1964), the Supreme Court decided that mandamus for compliance with the general state laws requiring frequent reapportionment of electoral districts would not lie, because the City of Virginia Beach had followed its own City Charter rather than state law. In the Davis case, the Petitioners sought reapportionment and an Order for election of a new City Council, a matter generic with the subject matter of both the City Charter Section and State Code Section involved in the instant case. In dismissing the allegation that the City Charter, granted by the General Assembly, violated the forerunner of Article IV, Section 14 (11) of the Constitution of Virginia, the Supreme Court

of Virginia held, at page 684:

> "Nor is the special legislation here under consideration invalid because of those provisions of § 63 of the Constitution, which prohibits special laws, 'for conducting elections or designating the places of voting.' As we said in Porter v. Joy, 188 Va. 801, 805, 51 S.E. 2d 156, § 63, 'refers to the manner in which an election is conducted.' We are not concerned in this case with the manner of conduct of an election. Our concern is whether the city council has the power to reapportion itself and has the authority to order the election of a new council- an entirely different matter from that envisioned by § 63." (Emphasis added.)

In the leading case construing the meaning of "conducting an election," the Supreme Court of Virginia considered a challenge to a special Act applying to Arlington County for the selection of School Board members by popular vote, which conflicted with general state law under which Board members were appointed. In determining that the County was entitled to hold elections for School Board members, even under a special Act in conflict with a general state law, the Supreme Court provided a detailed analysis of the meaning of the terminology, "law for conducting elections."

Porter v. Joy, 188 Va. 801, 805:

> "The appellees insist that the 1947 statute hereunder consideration cannot be considered a 'law for conducting elections.' In their brief they present the following argument as to the purpose and effect of the provision in section 63:
>
> 'The section merely forbids local law for conducting elections and designating the places of voting. This [illegible] to the manner [illegible]

the keeping of poll lists, the opening and counting of the ballots and numerous other provisions for the secrecy and safety of elections. The framers of the Constitution wanted to make certain that these general provisions should not be interrupted or interfered with by local laws permitting a man to mark a ballot by one method in one county and another in another or permitting one type of ballot in one and another in another or having different regulations touching on any of the essential matters concerning an election in different parts of the state.

"The position of the appellees is well taken. To permit a local law which would confer upon a county the authority to set up its own regulations with respect to the time of opening and closing of the polls, the selection of the judges of election, and many other matters relating to the conduct of elections, would be obviously undesirable. It seems clear that it was to avoid the evils which might flow therefrom that the provision forbidding such local regulations of elections was embraced in section 63 of the Constitution. It clearly was not intended as a restriction upon the power of the General Assembly to provide what offices in a county should be filled by election. This would have no appreciable effect upon the manner in which the election is conducted."

The same generic power was at issue in both of the foregoing cases and in the case now before the Court. All involved special Acts of the General Assembly applying to local communities, which convey the power to order an election and to set the date therefor. In each case the local law conflicted with general state law, but the prior cases held that the forerunner of Article IV Section 14 (11) of the Constitution of Virginia did not even address laws enabling localities to call a particular election at a particular time. In the Virginia [illegible], the conflict of laws dealt with the reapportionment [illegible] Council [illegible] Art[illegible]

allowing the County to call and hold an election under a scheme peculiar to that jurisdiction. The same issue is present in Section 32 of the Norfolk City Charter, the authority to call an election and to set the date therefor. This falls within the wording of Davis v. Dusch decision, "the authority to order the election."

It is apparent from the Supreme Court construction of the Constitutional Section in question that it is addressed by those Sections of Title 24.1 of the Code of Virginia dealing with the times of opening and closing the polls, selecting judges, keeping order within the polls, maintaining the books in which the names of registered voters are held, setting voting machines, printing questions and candidates' names on the ballot, and the other details of an election which may be encompassed within one phrase--the mechanics of an election. Therefore, it is clear that Article IV, Section 14 (11) speaks only to the mechanics of an election while Section 32 of the Norfolk City Charter speaks to an entirely different matter, the legal entitlement to an Initiative Election and the times within which it can be set.

B. City Charters enacted pursuant to Article VII, Section 2 are exempt from the prohibitions of Article IV, Section 14 of the Constitution of Virginia.

Both of the aforesaid provisions of the Constitution of Virginia had direct forerunners of almost identical language and of the same effect, denominated Sections 117 and 63 of the 1928 Constitution. In a parallel case involving a taxing power included in the Charter of the City of Roanoke, not authorized by general state law, and in apparent conflict with what is now Article IV, Section 14 (5) the Supreme Court of Virginia reaffirmed its fre-

quently stated rule for resolving such apparent conflict and upholding any Charter provision within the Constitutional grant found in now Article VII, Section 2, in the case of Fallon Florist v. City of Roanoke, 190 Va. 564, 574 (1950);

> ... "*** If section 63 of the Constitution, forbidding the passage of any local, special or private law regulating the practice in any judicial proceeding, is apparently in conflict with section 117, the conflict in more apparent than real. Section 63 must be held to apply to cases not otherwise specially provided for. It cannot be supposed that the Convention intended to impose upon the legislature any other restraints in the enactment or amendment of charters of municipal corporations than those imposed by section 117. It was dealing with that specific subject, and threw around it all the safeguards it deemed necessary. If these were complied with, the power of the legislature in reference thereto was unrestrained. The language of section 63 is general, that of 117 is specific. The general must give way to the specific, and section 63 applied to cases not otherwise specifically provided (for). In this way the two sections are made to harmonize, and the apparent repugnancy is avoided." (145 Va., at pages 107, 108.)
>
> The opinion further points out that under a similar attack the validity of special charter provisions was upheld in Miller v. Pulaski, 109 Va. 137, 63 S. E. 880, 22 L. R. A. (N. S.) 552, and Narrows v. Board of Sup'rs, 128 Va. 572, 105 S. E. 82. "The last two mentioned cases," it is said, "are authority for the proposition that special charters of municipal corporations or amendments thereof conferring rights and powers different from and in addition to those conferred by general statutes are authorized by the Constitution when enacted in conformity with article IV and section 117 of the Constitution; that when the enactment is published by the State as a statute, there is at least a prima facie presumption, in the absence of evidence to the contrary, that the charter, or amendment thereof, was enacted in the manner required by the Constitution; and

that the rights and powers conferred are within the legislative power to grant." (145 Va., at page 107.)

Upon the authority of the cases just referred to the same principles were applied and reaffirmed in Ransone v. Craft, 161 Va. 332, 170 S. E. 610. In that case the validity of an ordinance enacted by the council of the city of Roanoke regulating the operation of barber and beauty shops was attacked on the ground that the General Assembly had passed no general law empowering municipalities to adopt such regulations, as required by section 65 of the Constitution. In an opinion by Mr. Justice Hudgins, now Chief Justice of this court, it was held that inasmuch as the city had been empowered by the provisions of its charter, enacted in accordance with article IV and section 117 of the Constitution, to enact such an ordinance, the ordinance was valid notwithstanding the fact that the General Assembly had passed no general statute on the subject.

We adhere to what was said in these opinions with respect to the proper interpretation and application of these constitutional provisions.

The doctrine of the Fallon Florist case was reiterated in the previously cited decision of Davis v. Dusch, 205 Va. 676, 683-4 (1964), succinctly stating:

> That it is within the power of the legislature so to provide specially for the organization and government of cities and towns has long been recognized by this court. Beginning with Miller v. Pulaski, 109 Va. 137, 63 S. E. 880, and continuing through Pierce v. Dennis, supra, we have consistently upheld special legislation applicable to cities and towns, enacted pursuant to § 117, which was at variance with other provisions of Article VIII of the Constitution and with general statutes antedating such special legislation..."

Likewise, in the same year, the Virginia Supreme Court upheld a Charter Provision of the City of Falls Church in direct conflict with the general state law concerning the holding of local office by a Federal employee. The Court in Pierce v. Dennis, 205 Va. 478 (1964), held there (a) that a validly enacted City Charter whose

115

subject matter was within the power of the General Assembly to address under now Article VII Section 2, would be upheld in the face of apparent conflict with such constitutional prohibitions as found in now Article IV, Sections 14 and 15, and (b) that such Charter provisions in conflict with general state law "must be construed to be a qualified amendment of the general law, and controlling in the locality to which it applies." 205 Va. at 484.

It is apparent that Section 32 of the Norfolk City Charter lies within the constitutional grant of power to the Legislature in now Article VII Section 2, which in the second paragraph provides:

> "The General Assembly may also provide by special act for the organization, government and powers of any county, city, town, or regional government, including such powers of legislation, taxation, and assessment as the General Assembly may determine, but no such special act shall be adopted which provides for the extension or contraction of boundaries of any county, city, or town." (Emphasis added.)

The Initiative Election procedure is a means by which the citizens of the City of Norfolk are granted certain powers to participate in the passage of legislation and government of their city, a uniquely democratic process which is recognized by the foregoing provision of the Constitution of Virginia, a grant of power which has been found in every modern revision of the Constitution of Virginia.

Therefore the initiative election procedure of the Norfolk City Charter is not only presumed to be valid and constitutional, it addressess a subject not prohibited by other elements of the Constitution, is exempt from the prohibitions of any other provision of the Constitution, and prevails over any conflicting

general state law.

III. NORFOLK CITY CHARTER ELECTION LAW PREVAILS OVER GENERAL STATE ELECTION LAW

In addition to the authority of Pierce v. Dennis, 205 Va. 478 (1964), the previously cited case of Davis v. Dusch, 205 Va. 676 (1964), directly conflicts with general state law as to the timing of reapportionment and council elections shall control. This is consistent with the general principle of law recongnized by the Supreme Court of Virginia, in construing legislation, that the special governs over the general Act. In the more recent case of Dominion Chevrolet v. Henrico, 217 Va. 243 (1976), the Supreme Court ruled that an aggrieved taxpayer could invoke the more specific procedures of both a local and state law for the correction of assessments that were in conflict with a general state law as to the manner of asserting claims against counties. Dominion Chevrolet v Henrico states a rule of subject matter construction, in which the more special subject matter legislation prevails over the more general subject matter statute. This is analogous to the rule stated in the foregoing cases that laws applying to a special jurisdictional area prevail within that geographical location over general laws applying throughout the state.

Thus, it is apparent that the provisions of Section 32 of the Norfolk City Charter, specifying the manner in which an Initiative election shall be called prevail over Section 24.1-165 of the Code of Virginia, which provides generally for the calling and conducting of special elections. It should be noted

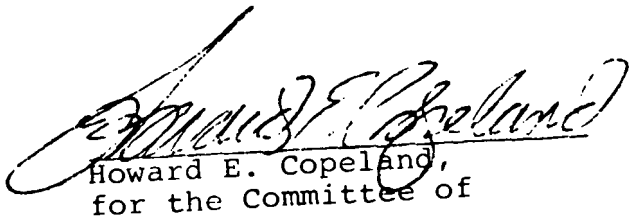
that the City Charter Section and the State Statute are not coextensive in their subject matter. Therefore, Section 32 of the City Charter prevails in those areas in which there is conflict, namely, as to the date on which such an election may be held. There is, for instance, no state law providing any procedure by which voters in a locality or of the state at large may petition for an initiative election or referendum.

The Norfolk City Charter determines the conditions under which an election must be ordered, including the prerequisites for calling the election and the dates within which it can be set. The general state law controls as to all mechanics for conducting the election. The provisions of Section 24.1-165 as to the timing of an election apply in the absence of specific enactments of the General Assembly controlling the scheduling of an election for a particular locality, such as Norfolk. The Norfolk City Charter, granted by the Legislature, is explicit and very limited in the time frame set for holding the election. These laws are in direct conflict, an election of laws by the Committee of Petitioners was required, and the Committee chose to follow the specific Act of the General Assembly applicable to this jurisdiction. The Committee should not be penalized or denied this Initiative Election because it followed the mandate of the Norfolk City Charter.

CONCLUSION

WHEREFORE, the Committee of Petitioners prays that the Court order that the proposed Ordinance, with an appropriate and descriptive title annexed thereto, be published as rquired by Section 32 of the Norfolk City Charter, and that there be no amendment to the Order of the Court heretofor entered, March

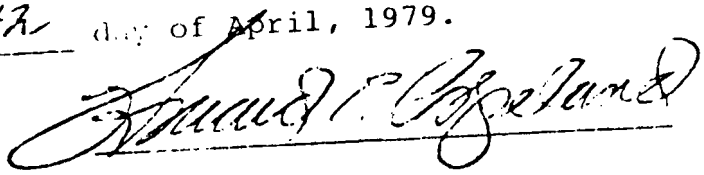
27, 1979.



Howard E. Copeland,
for the Committee of
Pititioners

CERTIFICATE

I hereby certify that I mailed a true copy of the foregoing Memorandum of law to The Honorable J. Marshall Coleman, Attorney General of Virginia, Mrs. Joan Mahan, Secretary of the State Board of Elections, J. Hume Taylor, Esquire, Secretary of the Norfolk Board of Elections, and Philip R. Trapani, City Attorney, City of Norfolk, on this 7th day of April, 1979.



INITIATIVE.

Sec. 30. Petition.

Any proposed ordinance or ordinances, including ordinances for the repeal or amendment of an existing ordinance, may be submitted to the council by petition signed by qualified voters equal in number to ten per cent of the number of electors who cast their votes at the last preceding regular municipal election for the election of councilmen. Such petition shall contain the proposed ordinance in full, and shall have appended thereto or written thereon the names and addresses of at least five qualified voters, who shall be officially regarded as filing the petition, and who shall constitute a committee of the petitioners for the purposes hereinafter stated.

Sec. 31. Time of filing.

All papers comprising the petition shall be assembled and filed with the city clerk, as one instrument, within one hundred and twenty days from the date of the first signature thereon, and when so filed the clerk shall submit the same to the council at its next regular meeting, and provision shall be made for public hearings upon the proposed ordinance.

Sec. 32. Petition for election.

The council shall at once proceed to consider such petition and shall take final action thereon within thirty days from the date of the submission thereof. If the council rejects the proposed ordinance, or passes it in a form different from that set forth in the petition, or fails to act finally upon it within the time stated, the committee of the petitioners may require that it be submitted to a vote of the electors in its original form, or that it be submitted to a vote of the electors with any proposed change, addition or amendment, by the following procedure: Said committee shall present to the clerk of the corporation court of said city a petition for such election, addressed to said court and signed by qualified voters equal in number to twenty-five per cent of the number of electors

who cast their votes at the last preceding regular municipal election for the election of councilmen, but in no case signed by less than four thousand qualified voters of the city. Said petition shall contain the proposed ordinance in full in the form in which it is proposed to submit the same to the electors. The said petition and all copies thereof shall be filed with the clerk of said court as one instrument. Within ten days after the filing thereof the said clerk shall ascertain and certify thereon whether the required number of qualified voters have signed the same. If it be found that the required number of qualified voters have signed the said petition, then the said petition, with the certificate of the said clerk thereon, shall be presented by said committee to the corporation court of said city, or to the judge thereof in vacation, and thereupon the said court, or the judge thereof in vacation, shall forthwith enter an order calling and fixing a date for holding an election for the purpose of submitting the proposed ordinance to the electors of the said city. Any such election shall be held not less than thirty nor more than sixty days after the date of the entering of said order. If any other election is to be held within the said period said court or the judge thereof shall direct that such proposed ordinance shall be submitted to a vote of the electors at such election. At least ten days before any such election the clerk of the said court shall cause such proposed ordinance to be published once in one or more newspapers of general circulation published in said city. (Acts 1918, ch. 34, p. 47; Acts 1956, ch. 339, p. 394.)

Editor's note.—Acts 1956, ch. 339, p. 394, added the provision requiring that the petition be signed by at least four thousand qualified voters of the city.

Sec. 33. Ballots and method of voting.

The ballots used when voting upon any such proposed ordinance shall state the title of the ordinance to be voted on, and the ballots and method of voting shall conform to the provisions of section 24-141 of the Code of Virginia.

147

036

If a majority of the electors voting on such proposed ordinance shall vote in favor thereof, it shall, upon the ascertainment and certification of the results of such election by the commissioners of election, become an ordinance of the city. (Acts 1918, ch. 34, p. 48; Acts 1956, ch. 339, p. 395.)

Editor's note.—Acts 1956, ch. 339, p. 395, changed the form of the ballots and the method of marking them.

Sec. 34. Ordinances adopted by the electors; how amended or repealed.

No ordinance adopted by the vote of the electors, as herein provided, shall be repealed or amended, except by vote of the electors; but the corporation court of said city, or the judge thereof in vacation, may, on request of the council, by resolution, order an ordinance to repeal or amend any ordinance so adopted, to be submitted to the electors at any regular election, or at any special municipal election called for some other purpose, provided that the clerk of said court shall cause notice of the proposed submission of such ordinance repealing or amending an ordinance, to be published once in one or more newspapers of said city not more than sixty nor less than thirty days prior to said election. If an amendment is so proposed such notice shall contain the proposed amendment in full, and such submission shall be in the same manner and the vote shall have the same effect as in the case of an ordinance submitted to election by popular petition.

REFERENDUM.

Sec. 35. Petition for referendum.

If at any time within a thirty-day period following the adoption of an ordinance a petition, signed by qualified voters equal in number to twenty-five percent of the number of electors who cast their votes at the last preceding regular municipal election for the election of councilmen, but in no case signed by less than four thousand qualified voters of the

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

IN RE: INITIATIVE PETITION C-431-79A

MEMORANDUM IN SUPPORT
OF THE CITY'S MOTION TO VACATE

Philip R. Trapani
City Attorney
R. Barrow Blackwell
Assistant City Attorney
Mary L. G. Nexsen
Assistant City Attorney
Room 908, City Hall Building
Norfolk, Virginia 23501

Of counsel for the City of Norfolk

I. THE ACTIONS OF THE NORFOLK CITY COUNCIL IN PREPARING, APPROVING AND ADOPTING THE ANNUAL NORFOLK CITY TAX ORDINANCE ARE ADMINISTRATIVE IN NATURE AND AS SUCH, ARE NOT SUBJECT TO INITIATIVE OR REFERENDUM PROCESSES.

The Constitution of Virginia, Art. VII §2, authorizes the General Assembly to confer the power of taxation upon local governmental units and the Charter of the City of Norfolk states that the City shall have the power:

> (1) To raise annually by taxes and assessments in said city sums of money as the council shall deem necessary for the purposes of the city and in such manner as said council shall deem expedient ... City Charter §2.

Charter §68 provides:

> That the Council shall pass an annual appropriation ordinance, based on the proposed budget and shall levy taxes as may be necessary, together with other revenues of the City, to meet the appropriations made and all sums required by law to be raised on account of the City debt.

Charter §88 further provides that City Council also has the "right and power, in lieu of any other method prescribed by law, to provide for the annual assessment and reassessment of real estate for taxation."

The annual budget, prepared by the Manager and submitted to City Council, includes:

> (b) An itemized statement of the taxes required and of the estimated revenues of the city from all other sources for the ensuing fiscal year. Charter §67.

A public hearing on the proposed budget must be held before Council action on the matter.

CITY OF NORFOLK

Actions of a governing body are comprised of legislative and administrative (or executive) functions. It is generally agreed that an enactment originating a permanent law or prescribing a rule of conduct or course of policy for citizens or their officers is purely legislative in character and is referable; while an enactment which simply puts into execution previously declared policies or previously enacted laws is administrative and therefore not referable. Whitehead v. H & C Development Corp., 204 Va. 144, 129 S.E.2d 691 (1963); 42 Am.Jur.2d, Initiative and Referendum, §12. The Whitehead case, which dealt with a proposed ordinance establishing a new schedule of water connection rates in Portsmouth, stated that:

> The crucial test is said to be whether a proposed ordinance is one making a new law, or one executing a law already in existence. If it merely pursues a plan already adopted by the legislative body itself, or may be properly classed among the executive powers, it is deemed to be administrative. Id. at p. 150.

City of Austin v. Findley, 538 S.W.2d 9 (Tex. 1976); McQuillin, Mun.Corps., 3rd Ed., Vol. 5, §16.55, p. 213; 62 C.J.S. Mun.Corps., §454b, pages 874 et seq.

Editorial comment on the Whitehead case, supra, in the Virginia Law Review published the same year indicates that where the management of the city matter amounts to a knowledgeable judgment respecting the balancing of expenses and costs which is beyond the competence of the electorate, the subject must be deemed executive or administrative, rather than legislative and removed from the realm of referable subjects. 49 Va.L.R. 1393 (1963).

CITY OF NORFOLK

In Whitehead, supra, the Va. Supreme Court recognized that each case of this type must be examined on its own merits and that some municipal functions are in an area between being administrative or legislative. "So variant are the conditions under which the question arises that each case must be settled on the facts of that particular case." Id. at p. 150.

McQuillin, in the treatise on Municipal Corporation, addresses the distinction between these governmental actions, stating:

> In reference to what constitutes legislative and what administrative action in connection to restriction of the power of initiative and referendum to legislative matters, it has been said that action relating to subjects of permanent and general character are usually regarded as legislative and those providing for subjects of temporary and specific character regarded as administrative. A construction of a provision that 'any proposed ordinance' may be submitted to the commonwealth by a petition signed by a number of qualified voters has been construed to mean that any legislative measure of permanent operation can be so submitted.
>
> * * *
>
> Obviously, details which are essentially of a fluctuating sort, due to economic or other conditions, cannot be set up in and by an ordinance be submitted to vote of the people under initiative and referendum statutes, which restricts submission to people the measures of permanent operation. 5 McQuillin, Mun.Corps. (3rd Ed. 1969) 16.55 p. 213.

The courts have generally examined proposed initiative or referendum elections in terms of certain powers and responsibilities being exclusively vested in the various city councils and where the city charters may not specifically confer such powers, the distinction

CITY OF NORFOLK

must then be drawn between those actions which are legislative (and referable) and those which are administrative (and non-referable).

The City Council of Seattle was charged with the responsibility of taxing and regulating liquor, in Hartig v. City of Seattle, 53 Wash. 432, 102 P. 408 (1940), and an amendment to the city charter provided for the reservation in the people of the city of the powers of initiative and referendum as to any matter within the realm of municipal affairs. A concurrent amendment gave to the city council the power to license, tax and regulate the selling of liquor and the power of the council was held not to be subject to the referendum provision because such power was exclusively vested in the council.

The referable nature of utility rate ordinances has been a matter of controversy and the courts have generally held that where the power to regulate utility rates is given to the municipality by general law or charter provision setting out the procedure to be followed and providing for notice and hearings to the persons affected, ordinances dealing with the fixing of rates are generally held to be outside the operation of initiative and referendum laws. In Southwestern Telephone and Telegraph Company v. City of Dallas, 104 Tex. 114, 134 S.W. 321, 322 (1911), the court held that the phrase "any proposed ordinance", contained in the provision setting out the procedure for the application of

CITY OF NORFOLK

the initiative power, did not include all ordinances upon any subject of legislation and that an initiated ordinance fixing maximum telephone rates was invalid since the city charter gave the legislative body of the city the power to regulate utilities only after notice and hearings involving the persons affected.

In Glass v. Smith, 244 S.W.2d 645, 150 Tex. 632 (1951) a proceeding in mandamus was brought to compel city officials to hold an election to determine the approval or disapproval of an ordinance initiated by citizens under the initiatory provisions of the city charter. The matter dealt with the classifying of police and firemen for the city of Austin, Texas. The Supreme Court of Texas said:

> When the people exercise their rights and powers under the initiative provisions of a city charter, they are acting as and become in fact the legislative branch of the municipal government. Accordingly, city charters frequently expressly limit the right of initiative to legislative matters. But even though a charter contains no such express limitation-and there is none in the Charter of the City of Austin-the limitation is usually read into the charter by the courts. Id. at p. 649; Southwestern Telephone and Telegraph Company v. City of Dallas, 104 Tex. 114, 134 S.W. 321, Denman v. Quin, Tex.Civ.App., 116 S.W.2d 783; McQuillin on Mun. Corps. 3rd Ed., Vol. 5, p. 263, Sec. 16.55.
>
> The field where the initiatory process is operative may also be limited by general law. Any rights conferred by or claimed under the provisions of a city charter, including the right to initiative election, are subordinate to the provisions of general state law. Id. at p. 649.

The Court, in clarifying this point, cited the case of Dallas Ry. Co. v. Geller, 114 Tex. 484, 271 S.W. 1106 (1925) and

CITY OF NORFOLK

noted that the referendum provisions of the charter of the City of Dallas did not apply to an ordinance authorizing a change of street railway rates, such determinations being strictly administrative in nature and entrusted to the board of commissioners. It was considered:

> At least impracticable, if not impossible, for the public at large, the voters, to pass on (this matter). They cannot have or digest the information, data and facts necessarily incident and essential to the forming of a correct, accurate and fair judgment upon the subject. Id. at p. 1107.

Referring to the provisions of the city charter which required a fair hearing, inspection of books, attendance of witnesses, etc., preliminary to the passage of the rate ordinance, the Court said: "We think it clear that the Charter provisions themselves reserve from referendum the fixing and scheduling of rates". Id. at p. 1107.

An often-cited decision on this subject of referendum and initiative, is the case of Denman v. Quin, 116 S.W.2d 783 (Tex.Civ.App. 1938) in which a mandamus action was held not to lie to compel the Board of City Commissioners of San Antonio to allow voters to register for a referendum to veto an ordinance levying an ad valorem tax on property valuation. In language very similar to the provisions of the Norfolk City Charter in Sections 2(1), 67, 68 and 88, under the charter of San Antonio, the board was charged with the duty to care for, manage and

CITY OF NORFOLK

control the finances of the city and to provide for payment of its debts and expenses. To that end, the board is given the power and the duty is expressly imposed upon them, to annually assess property values and levy taxes according to that ascertained value. The general laws of the state specifically provide the processes and procedures by which the board shall exercise these powers and perform these duties prescribed by the charter. Relative to this same matter, the Mayor, each year, immediately before the taxes are levied, submits an annual budget to the Board of Commissioners in San Antonio. In accordance with all requirements and provisions of the state and municipal law, such budget was made available for inspection and hearing by the citizens, and was adopted by the board, which:

> Fixed an appropriate tax levy to meet the financial requirements of the city for the ensuing year in accordance with the budget so adopted, and, having arrived at and fixed such levy at $1.90 on each $100.00 valuation, passed an ordinance making said levy $1.90, which amount was well within the charter authority limiting the power of the city to a maximum levy of $2.25. Id. at p. 785.

In denying the petition seeking a referendum, the Court said that:

> Ordinances intended by the electorate to be subject to referendum are those which are legislative in character-as relating to subjects of general or permanent character. An ordinance originating or enacting a permanent law or lay ing down a rule of conduct or a course of policy for the guidance of the citizens or their officers is purely legislative in character, and referable. Id. at p. 786.

CITY OF NORFOLK

However, ordinances which are considered to be administrative in nature, simply putting into execution previously-declared policies, or previously-enacted laws, are not subject to referendum by the electorate.

The distinction is further drawn in the court's example in Denman:

> An ordinance fixing salaries to be paid to city officials is a practical example of an ordinance which is referable, it being permanent general legislation which empowers the Board of Commissioners to levy taxes and appropriate the public funds to put that law into execution; while an ordinance levying taxes to raise funds for the payment of the salaries so authorized in the general or permanent provision, is a fair example of the character of ordinances which, because of their very nature, cannot be deemed referable. Id. at p. 786.

The latter type of ordinance is administrative in its purpose and effect, serving to execute the previously-enacted legislative policy of paying certain salaries.

Beyond the legal divisions which are drawn between matters which are legislative (and referable) and administrative (and non-referable) lies a perhaps simpler basis for the court's determination in Denman, supra, that the administrative tax levy was not subject to referendum:

> It seems to be perfectly obvious, too, that ordinances which must rest upon minute investigation of facts and figures, or application of expert, skilled, or technical knowledge, or upon close and careful study or ascertainment of masses of facts and figures, such as the elements entering into the matters of rate making, cannot be efficiently initiated or passed upon by the public en masse, however intelligent or patriotic they may be. Id. at p. 786.

CITY OF NORFOLK

The final paragraph of the Denman case, supra, opinion is the most persuasive on this point of referendum on tax matters and the court strongly supports its holding that the matter is not referable to a vote of the people. The ordinance is:

> Putting into execution previously-enacted laws authorizing the levy of taxes for the payment and servicing of existing contractual obligations of the city and the maintenance and operation of the affairs and business of the municipality. Id. at p. 786.

Hearing no challenge to the manner in which the compilation of the city budget has been made, the court presumed that the Commissioners had correctly determined the obligations and expenses of the city and that:

> There only remained the administrative duty of calculating the approximate amount of money required to meet those burdens, and fixing a tax levy sufficient to raise that amount. That was the object and effect of the ordinance under attack here. Id. at p. 797.

Based therefore upon the administrative character of the ordinance, the duty and authority of the Board of Commissioners to administer the tax levy, and the complicated structure of the tax ordinance itself, the Court held that the mandamus to compel a popular election would not lie.

Norfolk City Charter Sections 2(1); 67; 68 and 88 clearly give the City Manager and the City Council the power and duty to determine the City's financial needs and to meet those needs in the levying and collection of taxes. These financial determinations are set forth in the annual budget which is dis-

CITY OF NORFOLK

cussed in a hearing which is open to the general public, and the tax rates which are the subject of the proposed referendum, are a part of that annual budget.

In Hancock v. Rouse, 437 S.W.2d 1 (Tex.Civ.App. 1969) citizens sought to compel the submission of a zoning ordinance to initiative or referendum proceedings. Relying on the earlier decision in Glass v. Smith, 150 Tex. 632, 244 S.W.2d 645 (1952), the court noted that city charters frequently limit the right of initiative to legislative matters:

> But even though a charter contains no such express limitation ... the limitation is usually read into the charter by the courts. The field where the initiatory process is operative may also be limited by general law. Id. at p. 648.

When the initiative or referendum power is denied to the electorate, such denial is generally based on the fact that:

> The authority to act was expressly conferred upon the municipal governing body or that there was some preliminary duty, such as the holding of hearings, etc., impossible of performance by the people in an initiative proceeding, by statute or charter made a prerequisite to the exercise of the legislative power. Id. at p. 2. McCutcheon v. Wozencraft, 116 Tex. 440, 294 S.W. 1105 (1957), Southwestern Telephone and Telegraph Company v. City of Dallas, 104 Tex. 114, 134 S.W. 321 (1911), Denman v. Quin, 116 S.W.2d 783 (1938).

In the Hancock case, supra, the zoning commission was required to prepare a report and hold a public hearing before submitting such report to the city legislative body which was then charged with a further requirement of another public hearing

on the proposed ordinance. The preparation of the report required careful study, the accumulation of detailed information and the professional advice of a city planner. The matter was clearly intended by the charter to be handled by the municipal legislative body and the provisions of the general law requiring hearing and notice could not be complied with if the ordinance were submitted to an election.

> For a hearing to be meaningful, it necessarily must be held before the body authorized to act in the matter. Since notice and hearing are clearly required by the Charter and the general law of the State, as a prerequisite to the enactment of zoning ordinances, and since notice and hearing have no place in the process of through initiative and referendum, the power of the people to legislate directly does not extend to this subject. Id. at p. 4. State v. Donohue, 368 S.W.2d 432 (Mo. 1963); City of Scottsdale v. Supreme Court, 103 Ariz. 204, 439 P.2d 290 (1968).

The City of Columbia, Missouri was a party to an action to compel initiative in the matter of a cable television franchise in International Telemeter, Etc., Corp. v. City of Columbia, 488 S.W.2d 244 (1972), and the Court cited the accepted general rule as stated in 42 Am.Jur.2d, Initiative and Referendum, §9, p. 658: "Where the required procedure for a particular ordinance involves steps such as notice and hearing in addition to normal legislative deliberation, such an ordinance is not subject to initiative or referendum", and did not order the ordinance to be submitted to initiative voting.

CITY OF NORFOLK

In Newsome v. Board of Supervisors, 205 Cal. 262, 270 p. 676, 1 (1960), the Court in a similar franchise action denied the initiative to the people and stated that:

> These considerations require necessary and precedent findings of fact by the board, together with the further statutory requirement of a hearing and a determination on protests and asserted prior rights, compel the conclusion that it was not intended, either by the provision of the Constitution or by the municipal code that the initiative should be applicable here. Id. at p. 680.

Where the required procedure for a particular ordinance involves steps, such as notice and hearing, in addition to normal legislative deliberation, such an ordinance is not subject to initiative and referendum. Campden v. Greiner, 15 Cal.App.2d 836, 93 Cal.Rptr. 525 (1971), Dewer v. Doxey-Layton Realty Co., 277 P.2d 805 (S.Ct. Utah 1954), Whitehead, supra; Antieau, Municipal Corp. Law, Vol. 1, 4.31 (1975), Rhyne, Municipal Law, §9-14 (1957).

Norfolk City Charter §40 provides that "all other ordinances passed, unless exempted by law, shall be subject to the referendum". In an action to compel the City Clerk to submit the city budget to referendum, Cuprowski v. City of Jersey City, 242 A.2d 873 (N.J. 1968), the Superior Court of N.J. held that a statute providing that all ordinances should be subject to referendum applied to legislative ordinances and was not intended to include resolutions or ordinances of an executive or administrative nature, and

CITY OF NORFOLK

further, that the statute did not make the municipality's budget a proper subject for referendum. The language of the applicable New Jersey law was quoted in the case and provided, in NJSA 40:69A-185 that:

> The voters shall have the power of referendum which is the power to approve or reject at the polls any ordinance submitted by the council to the voters or any ordinance passed by the council ....

The recent case of In Re Certain Petitions Etc., 381 A.2d 1217 (N.J. 1977), reiterated earlier decisions and held that "any ordinance" does not mean "all ordinances", but means any ordinance except such as to which contrary legislative purpose may be discerned, whether, express or implied.

In another New Jersey decision, the Superior Court in Sparta Township v. Spillane, 125 N.J.Super. 519, 312 A.2d 154, Certif.denied 64 N.J. 493, 317 A.2d 706 (1974), held that municipal budget ordinances were not subject to popular referendum, since they were matters of administrative determination.

In the 1977 Colorado case of City of Aurora v. Zwerdlinger the city charter provided that the referendum power applied to "all ordinances" except four listed exemptions. Although the petitioners contended that this language would allow a referendum on the proposed raise in rates and charges for city water the court held that "references in municipal

CITY OF NORFOLK

charters to 'all ordinances' have generally been interpreted as meaning only ordinances which are legislative in character". Id. at p. 1076.

The submission of tax assessment and levying ordinances to initiative or referendum election proceedings has been specifically considered by the courts. In the California case of Dare v. Lakeport City Council, 91 Cal.Rptr. 124, 12 Cal.App.2d 864 (1970), the city's power to assess and collect taxes, as authorized by the state Constitution, was challenged by a petition seeking a referendum to amend a municipal ordinance on certain sewer tax rates. The Court noted that the constitution empowered the municipality to "levy taxes", levying including both assessment, which is the ascertainment and adjusting of shares respectively to be contributed by persons, and also the collection of the taxes. The taxing function of the city council was deemed administrative in nature and the court cited authority for its denial of the referendum process in tax matters. Geiger v. Bd. of Supervisors of Butte County, 48 Cal.2d 832, 313 P.2d 545 (Cal.Sup.Ct. 1957); Hunt v. Mayor and Council of Riverside, 31 Cal.2d 619, 191 P.2d 426 (1948). The Court in the Dare opinion, supra, emphasized that the use of the term referendum is in a generic context and "although the authorities deal generally with referendum powers, it is also the law that the initiative process does not lie with respect to

statutes and ordinance 'providing for tax levies'". Dare, supra, at p. 126.

In the Hunt case, supra, at p. 14 , the city council had adopted a city sales tax and the court ruled that municipal referendum powers cannot affect ordinances authorizing tax levies. The council had the duty and responsibility, under the charter of the City of Riverside, to fix by ordinance the amount of money necessary to be raised upon the taxable property of the city, and to assess and collect such amounts from the citizens. The holding noted that:

> ... the charter in its present form cannot reasonably be construed as contemplating that Council, in making up the city budget and in levying permissible taxes to assist in providing necessary city revenue, should be hampered by the uncertainty and delay of referendum proceedings. Id. at p. 432.

The fact that tax ordinances have repeatedly been classified as administrative actions of governing bodies and thus not referable should not be construed to mean that those same ordinances can be the subject of initiative elections. A lodging tax ordinance was the subject of an initiative petition in the case of Myers v. City Council of Pismo Beach, 241 Cal.App.2d 237, 50 Cal.Rptr. 402 (1967). City council refused to consider the citizen petition and the California District Court of Appeals noted:

> (1) A proposed initiative ordinance cannot be used as an indirect or backhand technique to invoke the referendum process against a tax ordinance .... The electors of Pismo Beach have no referendum power when it comes to

CITY OF NORFOLK

> repealing a tax ordinance. That which the electors have no power to do directly, they obviously cannot do indirectly.
>
> (2) Such a proposed initiative ordinance, even if approved by a vote of the electors, cannot be used as a means of tying the hands of the city council and depriving it of the right and duty to exercise its discretionary power in a taxation matter. Id. at pp. 243-244, 50 Cal.Rptr. at p. 406.

In specific reference to the government of municipalities the supporting rationale for drawing a distinction between referable and non-referable ordinances, the court in Carson v. Oxenhandler, 334 S.W.2d 394 (Mo.Ct.App. 1960) stated:

> The rule that only acts legislative in nature are subject to referendum is particulary applicable in the field of municipal corporations. The legislative body of a municipality, whether it be designated a city council, board of alderman, or otherwise, is frequently called upon to act in an administrative as well as a legislative capacity by the passage of ordinances and resolutions. From an early date in the history of the right of referendum, it has been recognized that to subject to referendum any ordinance adopted by a city council, whether administrative or legislative, could result in chaos and the bringing of the machinery of government to a halt ... Id. at p. 399.

In any government, there must be areas which are reserved for the judgment and knowledge of the elected officials and an essential function of a governing body is the management of the financial affairs of the city. Such responsibility involves the fixing of a budget to be used as the basis for determining the amount and rate of taxes to be levied. Geiger, supra, at p. 14. To say

CITY OF NORFOLK

that administrative determinations are subject to referendum would place municipal governments in a straight jacket and make it impossible for the city's officers to carry out the public's business and cases dealing with the question of whether a city budget is a legislative or administrative function shows that such action has been uniformly held to be administrative. Denman v. Quin, supra, State ex rel. Keefe v. St. Petersburg, 106 Fla. 742, 144 So. 313, 145 So. 175 (Fla.Sup.Ct. 1933); Keigley v. Bench, 97 Utah 69, 89 P.2d 480 (Utah Sup.Ct. 1939).

In State ex rel. Keefe, supra, it was held that referendum provisions did not apply to appropriation ordinances because matters of financial management were pecularily within the special knowledge of municipal officials. The Court said:

> Matters of financial management, while legislative in their character, are such as are impliedly, if not expressly required by the charter to be dealt with by the city's responsible officials with knowledge of the possible resources of the city, and the necessities required to be met through the exercise of the delegated power of taxation. Id. at p. 176.

The appropriation ordinances which were being challenged were held to be administrative actions of the city governing body, such measures, "required by law to be adopted at stated intervals, for the purpose of making effective the statutory budget system of finances prescribed by the city's fundamental law." Id. at p. 175.

Further, the legislative function test of permanency previously set forth by McQuillin and other authority is not met by

CITY OF NORFOLK

the budget in the Cuprowski case and the Court so held, stating:

> A city's budget can only be fixed at a certain amount for a comparatively short length of time; hence, the conclusion is evident that a city's budget is an administrative rather than a legislative act. Id. at p. 880.

As a preface to its decision concerning the issuance of certain bonds, the court in Lawrence v. Schrof, 392 A.2d 1243, 162 N.J.Super. 375 (1978) conclusively stated that "the preparation, approval and adoption of a municipal budget on an annual basis is administrative in character" and not subject to the referendum procedure.

The court further noted that the consensus of judicial opinions throughout the United States on this question is that the preparation, approval and adoption of a municipal budget is administrative in nature and that to permit the electorate to veto or recall a city budget affecting the fiscal affairs of the city would result in chaos. Cuprowski, supra, at p. 880.

Where there is a clear directive in the law providing for initiative or referendum in budgetary matters, such voting must be held, Spencer v. Alhambra, 44 Cal.App.2d 75, 111 P.2d 910 (Cal.D. Ct.App. 1941):

> But in the absence of such clear, positive and unambigious mandate by the legislative, the majority view is that appropriations and budgetary ordinances or resolutions are not subject to initiative and referendum. Id. at p. 880.

Also noted is the California Supreme Court decision in Simpson v. Hite, 36 Cal.2d 125, 134; 222 P.2d 225, 230 (1950):

> The initiative or referendum is not applicable where the inevitable effect would be greatly to impair or wholly destroy the efficiency

CITY OF NORFOLK

> of some other governmental power, the practical application of which is essential. * * * The taxing power 'is probably the most vital and essential attribute of the government'. Id. at p. 127 (Watchtower Bible and Tract Soc. v. County of L.A., 30 Cal.2d 426, 429, 182 P.2d 178, 180) 1955.

The courts weigh the rights of citizens to invoke the initiative or referendum processes against the burden which such actions place on the local governing bodies.

> A rule that the city's decision is subject to initiative or referendum if it is legislative in nature and is not so subject if administrative in nature is based on the premise that to allow the initiative or referendum to be invoked to annul or delay executive or administrative conduct would destroy the efficiency necessary to the successful administration of a city's business affairs. Duran v. Cassidy, 28 Cal.App.2d 574, 104 Cal.Rptr. 793, 798 (1972); Friends of Mt. Diablo v. County of Contra Costa, 72 Cal.App.2d 1006, 139 Cal.Rptr. 469 (1977).

The authorities of taxation, budgeting and financial appropriations lie with the City Manager and City Council, as expressly stated in the Norfolk City Charter provisions set forth previously in this discussion.

In addition to the general operational expenses which the City must consider in formulating its annual budget and in determining the tax rate necessary to finance that budget, the City must annually assess and collect such real property taxes as are necessary to meet all municipal bond obligations. Once such bonds have been issued, principal and interest payments come due on the City's bonds

on a yearly basis and city officials must make administrative determinations in order to fund such payments.

City Charter §86 authorizes City Council to approve the issuance of bonds, pledging the full faith and credit of the City to the payment of the obligations undertaken on account of such bonds.

The instruments which evidence the three most recent general improvement bonds issued by the City (1969, 1972 and 1977) carry the following language on the face of the bond:

> The faith and credit of the City are hereby pledged to the punctual payment of the principal of and the interest on this bond in accordance with its terms.

The legal opinion of the City's bond counsel which is also included on the 1969 and 1977 instruments states:

> In our opinion the bonds are valid and legally binding general obligations of the City and the City is authorized and required by law to levy on all real property taxable by the City such ad valorem taxes as may be necessary to pay the bonds and the interest thereon without limitation as to rate or amount....

The 1972 bond contained the above language but injected the phrase "unless paid from other sources" before noting that the source of payment would most usually be the real property taxes levied by the City. Reference to another source of payment appears only in the 1972 issue and all bond instruments issued before and after that of 1972 require the payment of the City's obligation to be made from real property tax revenue.

CITY OF NORFOLK

The City is contractually bound to meet all obligations undertaken in regard to its General Improvement bond issues. The 1972 bond language which referred to "other sources of payment" for bond obligations had not appeared on a bond previous to 1972 and has not appeared since that issue. It is clear, then, that the City must determine an annual real estate tax rate and assess and collect such taxes as will enable it to make principal and interest payments as they are due on all municipal bonds. Any attempt by the electorate to set real estate tax rates at a level below that which the Council has determined is necessary to meet the City's contractual obligations would seriously impair or preclude the City from meeting these obligations to which it has pledged its full faith and credit.

The ascertaining and meeting of the city's financial obligations through taxation is an administrative action which necessarily follows the grant of the taxation authority and the nature of that function serves simply to implement the various policies which Council deems necessary on an annual basis. The compilation of the budget is a process which requires a degree of skill and knowledge which is not possessed by the general public and city officials must bear the burden of the details and study inherent in its preparation. It is not a matter which can, or should, be referred to the electorate for its composition. The printed budget and public hearings allow citizen comment but

CITY OF NORFOLK

the volume of the project does not lend itself to general popular review. The governing body has been authorized to administer this function and a popular election on this matter is supported by neither law nor logic.

II. THE INITIATIVE AND REFERENDUM PROCEDURES OF THE NORFOLK CHARTER ARE SUPERSEDED AND REPEALED BY STATE LAW, WHICH PROHIBITS THE HOLDING OF AN INITIATIVE ELECTION.

Section 24.1-165, Code of Virginia (1950), as amended in 1978, provides in pertinent part, that:

> Notwithstanding any other provision of any law, or of the charter of any city or town, to the contrary, no referendum shall be placed on the ballot, unless specifically authorized by statute, or municipal charter provisions of the cities of Newport News, Virginia Beach and Fairfax existing January one, nineteen hundred seventy-five, or, in the case of a referendum to authorize the issuance of bonds of a city or town, by statute or by the charter of such city or town. (Emphasis supplied.)

Enacted later in time than Sections 30 through 32, inclusive, of the Norfolk Charter of 1918, which sections provide for the initiative process, this general law supersedes and effectively repeals these Charter provisions, thereby prohibiting any initiative election ordered held thereunder.

It is well settled in Virginia that the negative phraseology, "notwithstanding any other provision of law, or of the charter of any city or town, to the contrary...," recognizes the existence of Charter provisions which conflict with the substance of the general law prefaced by such language and indicates, in terms clear and unmistakable, a legislative intent to repeal these conflicting provisions. See Commonwealth v. Sanderson, 170 Va. 33, 39 (1938). This interpretation is fully

consonant with the rule of statutory construction which, while deferential to special acts embracing the same subject matter as the general law, holds that the later general impliedly repeals the earlier special where negative words are used, or where the statutes are manifestly inconsistent. Scott v. Lichford, 164 Va. 419, 423 (1935). Inasmuch as the term "referendum," as used in Virginia Code §24.1-165, is intended to embrace both initiative and referendum elections, the initiative procedures of the City's Charter are clearly provisions contrary to the general law prohibiting same.

The term "referendum" is not statutorily defined in Title 24.1 of the Virginia Code, but is, it is respectfully submitted, intended as a generic description of any election for which a sense of the people on a local issue is taken. The Attorney General, in interpreting Virginia Code §24.1-165, has consistently employed this definition. See Opinions of the Attorney General (1976-77), p. 73; (1974-75), p. 161. This definition comports with the common meaning ascribed to the word "referendum." In the construction of statutes, words should be given their natural and ordinary meaning unless from the statute itself it plainly appears that the legislature intended otherwise. Franklin & P. Ry. Co. v. Shoemaker, 156 Va. 619, 623 (1931); Harrison v. Wissler, 98 Va. 597 (1900); McCarron v. Commonwealth, 169 Va. 338 (1937). A contrary intendment,

CITY OF NORFOLK

which would permit an initiative but not a referendum election, would, however, defeat the object of the law, which is to foreclose the possibility of popular votes on local issues absent specific statutory authority or that conferred by the charters of only three cities (Norfolk will become the fourth after July 1, 1979). The electors of a municipality could thus accomplish indirectly through the initiative what they cannot do directly through the referendum, i.e., determine a local issue by popular vote. See Myers v. City Council of Pismo Beach, 50 Cal.Rptr. 402, 406 (1967) [Where voters have no referendum power to repeal tax ordinance, they cannot invoke initiative process as indirect or backhand technique. "That which the electors have no power to do directly, they obviously cannot do indirectly."] Cf. Dare v. Lakeport City Council, 91 Cal.Rptr. 124 (1970).

That the word "referendum" is used generically to include "initiative" finds support in Whitehead v. H & C Development Corporation, 204 Va. 144 (1963), in which the Virginia Supreme Court, in passing on the legality of the initiative election, drew no clear lines of distinction between the initiative and referendum. In Whitehead, the Supreme Court framed the issue on appeal as "...whether a certain proposed ordinance is within the authority of the initiative and referendum provisions of section 1, chapter 10 of the charter of Portsmouth...." 204 Va. 145.

Section 1, Chapter 10 of said Charter (Acts of Assembly, 1918, Chapter 69, pages 123, et seq.), provided only for the

CITY OF NORFOLK

initiative, and not for the referendum which was provided elsewhere in the Charter:

> The initiative--Any proposed ordinance or the question of the repeal of an existing ordinance may be submitted to the council of said city by petition signed by the qualified electors of the city equal in number to the percentage hereinafter required....
> (Emphasis supplied.)

The provisions which followed in the Portsmouth Charter described the procedure by which the petition was to be filed, and that the City Council must either pass the proposed ordinance without alteration within ten days or call a special election within a certain time after failing to pass it. These provisions are essentially similar to the initiative provisions of the Norfolk Charter, except that in Norfolk the court calls and fixes the date of election.

In granting an injunction forbidding the Electoral Board and the City from conducting a special election called by the Council when it failed to pass the proposed ordinance, the trial court held that the elector's proposed ordinance "is of an administrative and not of a legislative nature, and is not, therefore, subject to referendum under chapter 10, §1 of the charter of the city." 204 Va. 148. On appeal, the Supreme Court affirmed on this basis. In spite of the separate Portsmouth Charter provisions on initiative and referendum, the Court used the word "referendum" to characterize the end result of each: an election to take the sense of the voters on a local issue.

CITY OF NORFOLK

This definition of "referendum" finds further support in Section 24.1-1, Code of Virginia (1950). There are three types of elections held in Virginia, and a referendum can only be considered as a special, not a general or primary, election. Special election is defined by Section 24.1-1 (5) (c) as:

> ...any election...other than a general or primary election...to submit to the qualified voters a measure or proposition for adoption or rejection. (Emphasis supplied.)

This definition applies equally to the initiative and referendum. Both involve submission of a proposition to popular vote, and neither is therefore permitted under Section 24.1-165.

Finally, at the 1979 session of the General Assembly, Section 24.1-165 was amended to grant the City of Norfolk exempt status from the referendum prohibition, effective July 1, 1979. Enactment of this legislation, supported by the Norfolk Tea Party, affirms the City's position that the initiative and referendum procedures are not available to the voters of the City of Norfolk until the effective date of this amendment.

CITY OF NORFOLK

III. THE CLERK FAILED TO ASCERTAIN AND CERTIFY THAT THE SIGNATURES ON THE PETITIONS FILED BY THE NORFOLK TEA PARTY WERE OF QUALIFIED VOTERS, AS REQUIRED BY NORFOLK CITY CHARTER SECTION 32.

Section 32 of the Charter of the City of Norfolk requires that within ten days following the filing of a petition for election, the Clerk of the Court shall ascertain and certify thereon whether or not the required number of qualified voters have signed the petition. The function of the Clerk in the process of certification of an initiative or referendum petition would be to inspect the petition, passing on its sufficiency by noting those persons whom he has determined to be qualified voters and by excluding the names of unqualified persons. The Clerk then certifies or refuses to certify the petition as proper for its intended purpose. 5 McQuillin, Mun.Corps., §16.65 (1969).

The General Registrar of voters in the City of Norfolk is required, under Va. Code §24.1-46, to:

> (3) Maintain true and accurate separate books containing the names of registered voters in alphabetical order for each election district within his jurisdiction and make them available for all elections in such districts.

In accordance with this requirement, the General Registrar of the City compiles such books in order that they would be available for all inspections or uses which may be necessary.

The Petition for Election, accompanied by the forms containing the signatures of more than 10,000 persons, was filed with the Clerk of the Circuit Court on March 26, 1979. In a letter

CITY OF NORFOLK

dated the same day and addressed to the Judges of the Circuit Court, the Clerk stated that he had personally examined the attached petitions filed for the Petitioners and he presumed that there were a sufficient number of signatures of qualified voters. The Clerk's certification is facially invalid since the presumption of City Charter Section 44 that those persons signing the petition were qualified voters is no longer a valid means of certification by the Clerk. Charter Section 44 judges the qualifications of voters in terms of poll tax payments and such taxes are now illegal and uncollectible.

Because of the existence and availability of voter registration rolls, the Clerk could have complied with the requirements of Charter Section 32 by examining the petitions and the lists of qualified voters within ten days following the filing of the election petition. The fact that the Clerk stated in his letter of March 26th that he only presumed the signatures to be those of qualified voters clearly evidences his reliance on Charter Section 44 which makes such a presumption sufficient in light of poll tax records. Inasmuch as such taxes and records are no longer in existence, a certification based on Charter Section 44 is facially invalid and cannot be considered sufficient for purposes of the required certification. The Clerk, then, has failed to ascertain and certify the voter qualification of persons whose signatures appear on the election petitions filed by the Norfolk Tea Party and since the presentation of a certified petition is required as a condition precedent to the

CITY OF NORFOLK

calling of a special election, there is no power for the court to act where the Clerk has failed to properly examine the signatures of the petition submitted.

CITY OF NORFOLK

IV. THE TIME PERIODS WITHIN WHICH SAID ELECTION MAY BE HELD ARE GOVERNED BY STATE LAW, WHICH PROHIBITS THE HOLDING OF SAID ELECTION AS ORDERED BY THIS COURT.

Even assuming arguendo the legality of holding an initiative election, the time period within which it may be held is governed by general law, Section 24.1-165, Code of Virginia (1950), and not by Section 32 of the Norfolk Charter. Section 32 requires that "any such election shall be held not less than thirty nor more than sixty days after the date of the entering of said order." Pursuant thereto, this Court ordered on March 27, 1979, that the initiative election be held on May 15, 1979, clearly within the time limits prescribed by the Charter. Virginia Code §24.1-165 provides in pertinent part, however, that:

> Whenever any question or proposition is to be submitted to the electors of any county, city or town, or any referendum is ordered, the election on such question, proposition or referendum whether it be at a regular or special election shall be held as provided herein. Any order calling a special election shall be entered and the election held within a reasonable period of time subsequent to the receipt of the request for such special election if such request is found to be in proper order. No such special election shall be held unless it shall have been ordered at least sixty days prior to the date for which it is called. No such special election shall be held within the sixty days prior to a general or primary election. No referendum shall be held on the same day as a primary election. (Emphasis supplied.)

This general law is clearly broad enough to cover the holding of an initiative election, and the time periods provided therein for holding same supersede and repeal those provided in Section 32 of the Charter. The initiative election scheduled for

CITY OF NORFOLK

May 15, 1979 is by definition a special election, see Virginia Code §24.1-1(5)(c), held for the purpose of submitting to Norfolk voters a proposed ordinance for adoption or rejection, and falls squarely within the above-quoted section as a "...question or proposition...to be submitted to the electors..." of the City of Norfolk. Therefore, since the initiative election has not been ordered held "at least sixty days prior to the date for which it is called," as required by Section 24.1-165, it cannot be held on May 15, 1979. Moreover, since a primary election is to be held on June 12, 1979, the initiative election cannot be ordered held within 60 days prior to said primary election. Section 24.1-165.

Inasmuch as the above-quoted provisions of general law, Section 24.1-165, do not contain language expressly repealing Charter Section 32, if this latter special act is to be repealed, it is by implication. While repeal by implication is not favored, if inevitable, it is as effective as an express statutory mandate. Berrus Watch Co. v. Kirsch, 198 Va. 94, 99 (1956). Implied repeal occurs in either of two ways. First, it is accomplished where the statutes cover the same subject matter and are irreconcilably repugnant. Chambers v. City of Roanoke, 114 Va. 766, 768 (1913). The rule is described in Commonwealth v. Sanderson, supra, 170 Va. at 39:

CITY OF NORFOLK

> While as a general rule the repeal of a statute is not favored, it is clearly recognized by all authorities that such a repeal is called for where there is a substantial conflict between the two statutes being considered, and the subject matter of the first statute is fully covered by the second.

Consistent therewith, while laws existing for the benefit of particular municipalities are ordinarily not repealed by general laws relating to the same subject matter, the general law will, however, repeal an earlier special act, where the provisions of the general are manifestly inconsistent with those of the special. Scott v. Lichford, supra, 164 Va. at 423; South & Western Ry. Co. v. Commonwealth, 104 Va. 314, 321-322 (1905).

Secondly, an earlier statute may be impliedly repealed by a subsequent enactment which in itself comprehends the entire subject of the earlier, and is intended, by its very comprehensiveness, as a substitute for all prior acts respecting the same subject matter. Sutherland (4th ed.), Statutory Construction, §23.13, p. 238; 82 C.J.S., Statutes, §§290, 292. This rule, as applied in Virginia, is best stated in American Cynamid Co. v. Commonwealth, 187 Va. 831, 841-842 (1948):

> Repeal by implication is not favored.... But if a later statute does not by its terms or by necessary implication repeal entirely a former one in pari materia, yet if it clearly appears that the later statute was intended to furnish the only rule to govern a particular case, it repeals the former to that extent. And in deciding that question "the occasion and reason of the enactment, the letter of the act, the context and spirit of the act, the subject matter and the provisions of the act, all have to be considered." (Emphasis supplied.)

CITY OF NORFOLK

See also, an earlier statement of this principle of statutory construction in Somers v. Commonwealth, supra, 97 Va. at 761:

> But where a later statute was plainly intended to embrace the whole subject to which it refers, and to be wholly substituted for all former statutes on the same subject, it must be held to be a legislative declaration that whatever is embraced in it shall prevail, and whatever is excluded is discarded and repealed.

See also, School Board v. Town of Herndon, 194 Va. 810 (1953); City of Petersburg v. General Baking Co., Inc., 170 Va. 303 (1938).

Applying the foregoing principles of law, it is clear that the requirement of Virginia Code §24.1-165 that an initiative election be held at least sixty days after entry of the election order is manifestly contrary to the requirement in Charter §32 that said election be held not less than thirty nor more than sixty days after said order is entered. While Charter §32 permits the election to be held less than sixty days after having been ordered, Virginia Code §24.1-165, enacted last in time, clearly does not permit such a result. To the extent, then, that the time frame provided in Charter §32 conflicts with that of Virginia Code §24.1-165, it is impliedly repealed.

Moreover, it is submitted that Virginia Code §24.1-165 is intended by the Legislature to furnish the only rule to govern the holding of special elections, of which the initiative is included. First, the language of the law itself is persuasive:

> Whenever any question or proposition is to be submitted to the electors of any county,

CITY OF NORFOLK

> city or town, or any referendum is ordered, the election...shall be held as provided herein.... (Emphasis supplied.)

No qualification prefaces this legislative declaration; it clearly applies to all such elections. Secondly, the language of the act as a whole contemplates that Section 24.1-165 provide the only rule respecting the time periods within which an initiative election may be held. Taken as a whole, the language of this general law indicates a legislative intent to provide for uniformity in the holding of all special elections of this kind. The statute recognizes the potential for interference with statewide general and primary elections caused by the separate and conflicting Charter provisions of the various localities. The possibility of such a result in the case at bar compels this construction of Section 24.1-165. Moreover, that uniformity is intended by the provisions of this general law finds further support in Section 24.1-19. That Section provides that the State Board of Elections is charged with supervising and cooperating the work of the local electoral boards to obtain uniformity and legality in all elections, and the Board is authorized to file either writs of mandamus or prohibition to effectuate this purpose.

Therefore, to hold the election on May 15, 1979 would be violative of the Section 24.1-165 mandate that such election be ordered held at least sixty days prior to the date for which it is called, inasmuch as only forty-nine days will have elapsed since entry of the election order, and, as a primary election

CITY OF NORFOLK

will be held on June 12, 1979, would also violate the requirement that no initiative election be held within sixty days prior to a primary election will also be violated by the holding of the initiative election.

CITY OF NORFOLK

V. THE PROPOSED ORDINANCE IS FATALLY DEFECTIVE IN THAT IT DOES NOT CONTAIN A TITLE AS REQUIRED BY THE CHARTER.

Section 14 of the Norfolk Charter of 1918 provides in pertinent part that:

> Sec. 14. Legislative procedure.
>
> Except in dealing with operations of parliamentary procedure the council shall act only by ordinance or resolution which shall be introduced in writing and all ordinances...shall be confined to one subject, which shall be clearly expressed in the title. (Emphasis supplied.)

It is clear that this Charter provision, which is State law, requires all ordinances to have a title. In the context of the initiative election, this requirement of a title extends to the proposed ordinance, inasmuch as the petition for election under Charter §32 must "contain the proposed ordinance in full in the form in which it is proposed to submit the same to the electors," and unless the proposed ordinance contains a sufficient title it is not a valid ordinance. This rule is further expressed in Section 33 of the Charter, which states that:

> The ballots used when voting upon any such proposed ordinance shall state the title of the ordinance to be voted on.... (Emphasis supplied.)

Where the law requires on ordinance to have a title, the title is part of the ordinance, and an ordinance having no title whatever or having an insufficient title is void. 5 McQuillin, Municipal Corporations (3rd Ed.), §16.16, pp. 152-153; 13B Mich. Juris., Municipal Corporations, §58, p. 107. The

CITY OF NORFOLK

proposed ordinance of the Committee of Petitioners, which has been ordered submitted to popular vote on May 15, 1979, and which has been made part of the Court record, does not have the required title, and is therefore fatally defective as a matter of law. As such, it cannot be properly placed on the ballot by title as mandated by Section 33 of the Charter, and therefore cannot be legally adopted by the voters.

CONCLUSION

For the foregoing reasons, the City of Norfolk respectfully submits that the Order for Special Election should be vacated, and that a determination be made by this Court that the said initiative election cannot be held as a matter of law.

Respectfully submitted,

CITY OF NORFOLK

By _____
Philip R. Trapani
City Attorney

Philip R. Trapani
City Attorney
R. Barrow Blackwell
Assistant City Attorney
Mary L. G. Nexsen
Assistant City Attorney
Room 908, City Hall Building
Norfolk, Virginia 23501

Of counsel for the City of Norfolk

CITY OF NORFOLK

Norfolk against Norfolk County; and thence southwardly along said corporate boundary to the point of beginning. The above described territory contains thirteen and five-tenths (13.5) square miles, more or less.

Sec. 2. Powers of the city.

In addition to the powers mentioned in the preceding section the said city shall have power:

(1) To raise annually by taxes and assessments in said city such sums of money as the council hereinafter provided for shall deem necessary for the purposes of said city, and in such manner as said council shall deem expedient, in accordance with the Constitution and laws of this state and of the United States; provided, however, that it shall impose no tax on the bonds of said city.

(2) To impose special or local assessments for local improvements and enforce payment thereof; subject, however, to such limitations prescribed by the Constitution of Virginia as may be in force at the time of the imposition of such special or local assessments.

(3) Subject to the provisions of the Constitution of Virginia and of section 86 of this Charter, to contract debts, borrow money and make and issue evidence of indebtedness.

(4) To expend the money of the city for all lawful purposes.

(5) To acquire by purchase, gift, devise, condemnation or otherwise, property, real or personal, or any estate or interest therein, within or without the city or state and for any of the purposes of the city; and to hold, improve, sell, lease, mortgage, pledge or otherwise dispose of the same or any part thereof.

(6) To acquire, in any lawful manner, for the purpose of encouraging commerce and manufacture, lands within and without the city not exceeding at any one time five thousand acres in the aggregate, and from time to time to sell or lease the same or any part thereof for industrial or commercial uses and purposes.

thereof at all reasonable times." (Acts 1918, ch. 34, p. 40; Acts 1952, ch. 239, p. 353; Acts 1964, ch. 24; Acts 1966, ch. 188.)

Editor's note.—Acts 1952, ch. 239, p. 353, added the provision relative to dispensing with any of the regular meetings during the months of July and August of any year. Acts 1964, ch. 24, provided the time and date for the first meeting following the regular municipal election when the first day of September falls on a Saturday, Sunday or Monday. Acts 1966, ch. 188, changed the provision relative to dispensing with any of the regular meetings during the months of July and August.

Sec. 13. Penalty for absence.

For each absence of a councilman from a regular meeting of the council, except where such absence is occasioned or required by city business, sickness, or other unavoidable cause, in which case the absence of such councilman may be excused by a two-thirds vote of the council, there shall be deducted from his pay a sum equal to two per centum of his annual salary. Absence from five consecutive regular meetings shall operate to vacate the seat of a member, unless his absence is excused by a council resolution setting forth the reason thereof, and entered upon the journal. (Acts 1918, ch. 34, p. 40; Acts 1926, ch. 289, p. 506; Acts 1954, ch. 72, p. 75.)

Editor's note.—Acts 1926, ch. 289, p. 506, inserted the exception in the first sentence of this section. Acts 1954, ch. 72, p. 75, changed the vote required for excusing a councilman for absence from a regular council meeting from a four-fifths vote to a two-thirds vote.

Sec. 14. Legislative procedure.

Except in dealing with questions of parliamentary procedure the council shall act only by ordinance or resolution which shall be introduced in writing and all ordinances except ordinances making appropriations, or authorizing the contracting of indebtedness or issuance of bonds or other evidences of debt, shall be confined to one subject, which shall be clearly expressed in the title. Ordinances making appropriations or authorizing the contracting of indebtedness or the issuance of bonds or other obligations and appropriating the money to be raised thereby shall be confined to those subjects

respectively. Nothing herein shall be construed to prevent the council from authorizing in and by the same ordinance the making of any one public improvement and the issue of bonds therefor.

The enacting clause of all ordinances passed by the council shall be, "Be it ordained by the Council of the City of Norfolk"; the enacting clause of all ordinances submitted to popular election by the initiative shall be, "Be it ordained by the people of the City of Norfolk". No ordinance, unless it be an emergency measure, shall be passed until it has been read by its title at two regular meetings not less than one week apart, or the requirement of such reading has been dispensed with by the affirmative vote of five of the members of the council. No ordinance, section or subsection thereof, shall be revised or amended by its title, section number or subsection number only, but the new ordinance shall contain the entire ordinance, section or subsection, as revised or amended. The ayes and noes shall be taken upon the passage of all ordinances or resolutions and entered upon the journal of the proceedings of the council, and every ordinance or resolution shall require, on final passage, the affirmative vote of at least four of the members. No member shall be excused from voting except on matters involving the consideration of his own official conduct, or where his financial interests are involved.

In authorizing the making of any public improvement, or the acquisition of real estate or any interest therein; or authorizing the contracting of indebtedness or the issuance of bonds or other evidences of indebtedness, (except temporary loans in anticipation of taxes or revenues or of the sale of bonds lawfully authorized); or authorizing the sale of any property or rights in property of the City of Norfolk, or granting any public utility franchise, privilege, lease or right of any kind to use any public property or easement of any description or any renewal, amendment or extension thereof, the council shall act only by ordinance; provided, however, that after any such ordinance shall have taken effect, all sub-

sequent proceedings incidental thereto and providing for the carrying out of the purposes of such ordinance may, except as otherwise provided in this Charter, be taken by resolution of the council. (Acts 1918, ch. 34, p. 40; Acts 1950, ch. 428, p. 821; Acts 1958, ch. 115, p. 103; Acts 1966, ch. 51.)

Editor's note.—This section was amended by Acts 1950, ch. 428, p. 821, by which the council was increased from five members to seven members, which amendment was ratified in the general election held Tuesday, November 7, 1950.

Such act amended this section by changing the affirmative vote required for dispensing with two readings of an ordinance from four to five and by changing the affirmative vote for the final passage of ordinances and resolutions from three to four.

Acts 1958, ch. 115, p. 103, added the provision as to the revision or amendment of subsections.

Acts 1966, ch. 51 added the phrase "by its title" in line seven of the second paragraph.

Sec. 15. Effective date of ordinances and resolutions.

All ordinances and resolutions passed by the council shall be in effect from and after thirty days from the date of their passage; provided, however, that the council may, by the affirmative vote of five of its members, pass any ordinance or resolution to take effect at the time indicated therein, but every measure providing for the sale or lease of city property, or making a grant, renewal or extension of a franchise or other special privilege, or regulating the rate to be charged for its service by any public utility, shall be in effect from and after thirty days from the date of its adoption. (Acts 1918, ch. 34, p. 41; Acts 1950, ch. 428, p. 822; Acts 1966, ch. 50; Acts 1972, ch. 706, § 1.)

Editor's note.—This section was amended by Acts 1950, ch. 428, p. 822, by which the council was increased from five members to seven members, which amendment was ratified in the general election held Tuesday, November 7, 1950. Such act amended this section by changing the affirmative vote required for the passage of emergency measures from four to five.

Acts 1966, ch. 50 substituted the word "declared" for "defined" in

INITIATIVE.

Sec. 30. Petition.

Any proposed ordinance or ordinances, including ordinances for the repeal or amendment of an existing ordinance, may be submitted to the council by petition signed by qualified voters equal in number to ten per cent of the number of electors who cast their votes at the last preceding regular municipal election for the election of councilmen. Such petition shall contain the proposed ordinance in full, and shall have appended thereto or written thereon the names and addresses of at least five qualified voters, who shall be officially regarded as filing the petition, and who shall constitute a committee of the petitioners for the purposes hereinafter stated.

Sec. 31. Time of filing.

All papers comprising the petition shall be assembled and filed with the city clerk, as one instrument, within one hundred and twenty days from the date of the first signature thereon, and when so filed the clerk shall submit the same to the council at its next regular meeting, and provision shall be made for public hearings upon the proposed ordinance.

Sec. 32. Petition for election.

The council shall at once proceed to consider such petition and shall take final action thereon within thirty days from the date of the submission thereof. If the council rejects the proposed ordinance, or passes it in a form different from that set forth in the petition, or fails to act finally upon it within the time stated, the committee of the petitioners may require that it be submitted to a vote of the electors in its original form, or that it be submitted to a vote of the electors with any proposed change, addition or amendment, by the following procedure: Said committee shall present to the clerk of the corporation court of said city a petition for such election, addressed to said court and signed by qualified voters equal in number to twenty-five per cent of the number of electors

who cast their votes at the last preceding regular municipal election for the election of councilmen, but in no case signed by less than four thousand qualified voters of the city. Said petition shall contain the proposed ordinance in full in the form in which it is proposed to submit the same to the electors. The said petition and all copies thereof shall be filed with the clerk of said court as one instrument. Within ten days after the filing thereof the said clerk shall ascertain and certify thereon whether the required number of qualified voters have signed the same. If it be found that the required number of qualified voters have signed the said petition, then the said petition, with the certificate of the said clerk thereon, shall be presented by said committee to the corporation court of said city, or to the judge thereof in vacation, and thereupon the said court, or the judge thereof in vacation, shall forthwith enter an order calling and fixing a date for holding an election for the purpose of submitting the proposed ordinance to the electors of the said city. Any such election shall be held not less than thirty nor more than sixty days after the date of the entering of said order. If any other election is to be held within the said period said court or the judge thereof shall direct that such proposed ordinance shall be submitted to a vote of the electors at such election. At least ten days before any such election the clerk of the said court shall cause such proposed ordinance to be published once in one or more newspapers of general circulation published in said city. (Acts 1918, ch. 34, p. 47; Acts 1956, ch. 339, p. 394.)

Editor's note.—Acts 1956, ch. 339, p. 394, added the provision requiring that the petition be signed by at least four thousand qualified voters of the city.

Sec. 33. Ballots and method of voting.

The ballots used when voting upon any such proposed ordinance shall state the title of the ordinance to be voted on, and the ballots and method of voting shall conform to the provisions of section 24-141 of the Code of Virginia.

If a majority of the electors voting on such proposed ordinance shall vote in favor thereof, it shall, upon the ascertainment and certification of the results of such election by the commissioners of election, become an ordinance of the city. (Acts 1918, ch. 34, p. 48; Acts 1956, ch. 339, p. 395.)

Editor's note.—Acts 1956, ch. 339, p. 395, changed the form of the ballots and the method of marking them.

Sec. 34. Ordinances adopted by the electors; how amended or repealed.

No ordinance adopted by the vote of the electors, as herein provided, shall be repealed or amended, except by vote of the electors; but the corporation court of said city, or the judge thereof in vacation, may, on request of the council, by resolution, order an ordinance to repeal or amend any ordinance so adopted, to be submitted to the electors at any regular election, or at any special municipal election called for some other purpose, provided that the clerk of said court shall cause notice of the proposed submission of such ordinance repealing or amending an ordinance, to be published once in one or more newspapers of said city not more than sixty nor less than thirty days prior to said election. If an amendment is so proposed such notice shall contain the proposed amendment in full, and such submission shall be in the same manner and the vote shall have the same effect as in the case of an ordinance submitted to election by popular petition.

REFERENDUM.

Sec. 35. Petition for referendum.

If at any time within a thirty-day period following the adoption of an ordinance a petition, signed by qualified voters equal in number to twenty-five percent of the number of electors who cast their votes at the last preceding regular municipal election for the election of councilmen, but in no case signed by less than four thousand qualified voters of the

city, be filed with the city clerk, requesting that any such ordinance be repealed, or amended, as stated in the petition, such ordinance shall not become operative until the steps indicated herein shall have been taken or the time allowed for taking such step shall have elapsed without action. Such petition shall state therein the names and addresses of at least five electors, who shall constitute a committee to represent the petitioners, who shall be officially regarded as filing the petition, and shall constitute a committee of the petitioners for the purposes hereinafter stated. Referendum petitions need not contain the text of the ordinance or ordinances, the amendment or repeal of which is sought, but shall contain the proposed amendment, if an amendment is demanded. (Acts 1918, ch. 34, p. 48; Acts 1956, ch. 339, p. 395; Acts 1972, ch. 706, § 1.)

Editor's note.—Acts 1956, ch. 339, p. 395, added the provision requiring that the petition be signed by at least four thousand qualified voters of the city. Acts 1972, ch. 706, deleted the first sentence of this section which stated that all ordinances, except emergency measures or appropriation ordinances, shall go into effect thirty days after passage.

Sec. 36. Proceedings thereunder.

The city clerk shall present the said petition to the council at its next regular meeting, and thereupon the council shall proceed to reconsider the ordinance. If, within thirty days after the filing of such petition, the ordinance be not repealed or amended as requested in such petition, the city clerk shall, if so requested by a writing signed by a majority of the said committee and presented to the said city clerk within twenty days after the expiration of said period of thirty days, present to the clerk of the corporation court of said city, the said petition and all copies thereof as one instrument together with a copy of the ordinance the repeal of which is sought. Within ten days after the filing of said petition, the clerk of said court shall ascertain and certify whether the required number of qualified voters have signed the same. If it be found that the required number of qualified voters have signed the said petition, then within five days after the expiration of

said ten days the said petition, with the certificate of the clerk thereon, shall be presented by the said committee to the corporation court of said city, or to the judge thereof in vacation, and thereupon the said court, or the judge thereof in vacation, shall forthwith enter an order calling and fixing a date for holding an election for the purpose of submitting the said ordinance to the electors of said city. Thereupon the said ordinance shall ipso facto be further suspended from going into effect until such election shall have been held and shall then be deemed repealed unless approved by a majority of those voting thereon. Any such election shall be held not less than thirty nor more than sixty days after the date of the entering of such order. If any other election is to be held within the said period, said court or the judge thereof in vacation shall direct that the said ordinance shall be submitted to the vote of the electors at such election. At least ten days before any such election the clerk of said court shall cause the said ordinance to be published once in one or more newspapers of general circulation published in said city.

Sec. 37. Ballots and method of voting.

The ballots used when voting upon such ordinance shall conform in all respects to the ballots required for an initiative election under section 33 hereof, and the method of voting in any such election shall be as prescribed in said section.

If in any such election the ordinance so referred or submitted be approved by a majority of the electors voting thereon, the said ordinance shall, upon the ascertainment and certification of the results of such election by the commissioners of election, go into effect as an ordinance of the city.

Sec. 38. Ordinances submitted by popular petition.

Ordinances submitted to the council by initiative petition and passed by the council without change, or passed in an amended form, and not required to be submitted to the vote of the electors by the committee of the petitioners, shall be

subject to the referendum in the same manner as other ordinances.

Sec. 39. Conflict of ordinances.

If two or more ordinances adopted or approved at the same election conflict in respect of any of their provisions, such ordinances shall go into effect in respect of such of their provisions as are not in conflict, and the one receiving the highest affirmative vote shall prevail insofar as their provisions conflict.

Sec. 40. Measures not subject to referendum.

Ordinances passed providing for any work, improvement or repairs certified by the city manager to be immediately necessary to protect public property or health from imminent danger, or to protect the city from imminent loss or liability, shall not be subject to the referendum. The certificate of the city manager in any such case shall be conclusive. All other ordinances passed unless exempted by law, shall be subject to the referendum in like manner as other ordinances, except that they shall go into effect at the time indicated in such ordinances. If, when submitted to a vote of the electors, an ordinance be not approved by a majority of the voters voting thereon, it shall be considered repealed as regards any further action thereunder; but such measure so repealed shall be deemed sufficient authority for payment in accordance with the ordinance of any expenses incurred previous to the ascertainment and certification by the commissioners of election of the result of the referendum vote thereon. (Acts 1972, ch. 706, § 1.)

Editor's note.--Acts 1972, ch. 706, amended this section by deleting all references to emergency measures.

Sec. 41. Preliminary action.

In case a petition be filed requesting that a measure passed by the council providing for the expenditure of money, for a bond issue or a public improvement be submitted to a vote of

the electors, all steps preliminary to such actual expenditure, actual issue of bonds or actual signing of a contract for such improvements may be taken prior to the election.

GENERAL PROVISIONS RELATING TO ELECTIONS AND TO THE INITIATIVE, REFERENDUM AND RECALL.

Sec. 42. Elections.

All elections for the election of councilmen, and all initiative, referendum and recall elections, shall be conducted, and the result canvassed and certified, by the regular election officials provided by the general election laws of the state; and, except as otherwise provided in this Charter, all such elections shall be governed by the said general election laws.

Sec. 43. Petitions.

All petitions for the nomination of councilmen and all petitions in connection with the initiative, referendum or recall shall be signed in ink or indelible pencil by the elector in person and not by agent or attorney. Each person signing any such petition shall place opposite his name the date of his signature, and his place of residence by street and number. The signatures to any such petition need not all be appended to one paper, but to each such paper (except in the case of copies of recall petitions, which may not be circulated), there shall be attached an affidavit by the circulator thereof stating that each signature appended thereto is the genuine signature of the person whose name it purports to be and that it was made in the presence of the affiant on the date indicated. All copies of any such petition shall be treated as originals. No such petition shall be deemed invalid by reason of the fact that it is signed by one or more persons who are not qualified voters, but the names of such persons shall not be counted. As used in this Charter the terms "elector," "qualified elector," and "qualified voter" are synonymous.

Sec. 44. Presumptions.

All signatures to any petition mentioned in the preceding section hereof shall be accepted and treated as prima facie genuine. For the purpose of certifying the number of qualified voters whose names are signed to any such petition the clerk of the corporation court of said city shall presume that any person whose name appears thereon is a qualified voter if such person (a) is exempt from the payment of poll taxes as a prerequisite to voting, or (b) appears from the treasurer's list of persons who have paid their poll taxes to have complied with the law as to payment of poll taxes so as to be a qualified voter on the date of his signature under the provisions and within the meaning of section 45 hereof, assuming him to be duly registered. All such petitions substantially complying with the requirements of this Charter and certified by said clerk to bear the required number of signatures of qualified voters shall be accepted and treated as prima facie sufficient. The burden of proving the insufficiency of any such petition in any respect shall be upon the person alleging the same.

Sec. 45. Qualifications of persons signing certain petitions.

The question whether any person is a qualified voter for the purpose of signing any nominating petition or any petition in connection with the initiative, referendum or recall shall be determined as follows: If any such petition be signed on or before the second Tuesday in June in any year, the person signing the same shall be deemed a qualified voter for that purpose within the meaning hereof, if qualified to vote on said second Tuesday in June. If such petition be signed after the second Tuesday in June in any year, the person signing the same shall be deemed a qualified voter for that purpose within the meaning hereof, if qualified to vote on the first Tuesday after the first Monday in November of said year.

Sec. 46. Duty of city attorney.

Before any ordinance or amendment proposed by popular

Sec. 66(a). Deputies and assistants of the city auditor.

The city auditor may, by and with the consent of the council, appoint one or more deputies and such number of assistants as may be provided by ordinance. Any of the official duties of the city auditor may be performed by any of his deputies. (Acts 1952, ch. 239, p. 354.)

Editor's note.—Section 66(a) was added to the Charter by Acts 1952, ch. 239, p. 354.

Sec. 67. The annual budget.

At least sixty days before the end of each fiscal year, the city manager shall prepare and submit to the council an annual budget for the ensuing fiscal year, based upon detailed estimates furnished by the several departments and other divisions of the city government according to a classification as nearly uniform as possible. The budget shall present the following information:

(a) An itemized statement of the appropriations recommended, with comparative statements in parallel columns showing estimates of the expenditures for the current year and the actual expenditures for the next preceding year.

(b) An itemized statement of the taxes required and of the estimated revenues of the city from all other sources for the ensuing fiscal year, with comparative statements in parallel columns of the taxes and other revenues for the current and next preceding year, and of the increases or decreases estimated or proposed.

(c) Such other information as may be required by the council.

(d) When putting a fiscal year from July first through June thirtieth into effect, the comparative statements required by the provisions of subsections (a) and (b) above shall not strictly apply for the fiscal years 1968-1969 and 1969-1970 but the city manager shall show in the budget such comparative figures as shall best carry out the intent of subsections (a) and (b) above.

Copies of such budget shall be printed and available for distribution after its submission to the council; and a public hearing shall be given thereon by the council before final action. (Acts 1918, ch. 34, p. 64; Acts 1956, ch. 115, p. 117; Acts 1968, ch. 174.)

Editor's note.—Acts 1956, ch. 115, p. 117, made changes in the information required to be presented by the budget prepared and submitted by the city manager. Also, prior to such act, this section provided that copies of the budget should be printed and available for distribution not later than two weeks after its submission to the council.

Acts 1968, ch. 174 added subsection (d).

Sec. 68. The annual appropriation; council may provide that taxes continue from year to year.

At least thirty days before the end of each fiscal year the council shall pass an annual appropriation ordinance which shall be based on the budget submitted by the city manager; and shall levy such taxes for the ensuing fiscal year, if not theretofore levied, as may be necessary, together with other revenues of the city, including taxes theretofore levied, to meet the appropriations made and all sums required by law to be raised for account of the city debt, together with such addition, not exceeding five per cent of the total appropriations, as may be necessary to meet any abatements from and deficiencies in the actual collection and receipt of the estimated taxes and other revenues of the city. The total amount of appropriations shall not exceed the estimated revenues of the city.

In levying taxes the council may provide that any tax so levied shall continue from year to year unless otherwise changed by the council. (Acts 1918, ch. 34, p. 65; Acts 1952, ch. 18, p. 26.)

Editor's note.—A comparison of the old and new sections is necessary to ascertain the changes made by Acts 1952, ch. 18, p. 26.

taxes when due and unpaid in the same manner and to the same extent that goods and chattels may be distrained and sold for state taxes.

A tenant by whom payment is made or from whom payment is obtained, by distress or otherwise, of taxes or levies due the city by a person under whom he holds, shall have credit for the same against such person out of the rents he may owe him, except when the tenant is bound to pay such taxes and levies by an express contract with such person. And where taxes or levies are paid to the city by any fiduciary on any estate in his hands or for which he may be liable, such taxes and levies shall be refunded out of the said estate.

Sec. 88(a). Assessment and equalization of assessments of real estate.

The council of said city shall have the right and power, in lieu of any other method prescribed by law, to provide for the annual assessment and reassessment of real estate for taxation, and to that end may appoint a single assessor to assess such real estate for taxation, may prescribe the duties and term of office of said assessor, may require that he shall give his entire time to the duties of his office, may remove him for cause, fix his compensation, which shall be payable out of the local treasury, and may likewise provide for such technical and clerical assistance as may be necessary or advisable and for the payment of any other expenses that may be properly incident thereto. Said annual assessments or reassessments shall be completed by said assessor by the thirty-first day of August of the year in which they are made.

All such real estate shall be assessed at its fair market value and the taxes for each year on such real estate shall be extended on the basis of the last assessment made prior to such year, subject to such changes as may have been lawfully made.

Notwithstanding any of the provisions of sections 58-895 and 58-899 to 58-901, inclusive, of the Code of Virginia, the

circuit court of said city or the judge thereof in vacation shall, annually, appoint for the city a board of review of real estate assessments, to be composed of three members, who shall be freeholders of said city. The terms of such members shall commence on their appointment and shall expire on the thirtieth day of November of the year in which they are appointed unless such terms are extended. Such court or the judge thereof in vacation may extend the terms of the members of the said board of review and shall fill any vacancy therein for the unexpired term. The members of the said board shall receive per diem compensation for the time actually engaged in the duties of the board, to be fixed by the council of said city, and to be paid out of the treasury of said city, provided, however, that the council of said city may limit the per diem compensation to such number of days as, in its judgment, is sufficient for the completion of the work of the board.

Such board of review shall have and may exercise the power to revise, correct and amend any assessments of real estate made by said assessor in the year in which they serve, and to that end shall have all the powers conferred upon boards of equalization by sections 58-903 to 58-912, inclusive, of the Code of Virginia. Notwithstanding any provision of said sections, however, the board of review may adopt any regulations providing for the oral presentation, without formal petitions or other pleadings of requests for review, and looking to the further facilitation and simplification of proceedings before the board.

Any person of said city aggrieved by any assessment made by said assessor or board of review may apply for relief in the manner provided by sections 58-1145 to 58-1151, inclusive, of the Code of Virginia.

This section shall not apply to the assessment of any real estate assessable under the law by the State Corporation Commission. (Acts 1950, ch. 488, p. 960.)

Editor's note.—Section 88(a) was added to the Charter by Acts 1950, ch. 488, p. 960.

audited as soon thereafter as practicable by the city auditor or by such agency or other means as the council may direct. The said board shall also report to the director of finance all investments made by it, and all moneys received by it within thirty days after the same shall have been made or received, and the director of finance shall keep an account of the same and report the said account to the council semiannually in January and July of each year, and as much oftener as may be required by the council. (Acts 1918, ch. 34, p. 70; Acts 1950, ch. 436, p. 853; Acts 1972, ch. 706, § 1.)

Editor's note.—A comparison of the old and new sections is necessary to ascertain the changes made by Acts 1950, ch. 436, p. 853. Acts 1972, ch. 706, changed the reference to the state Constitution in paragraph five from section 127 to article VII, section 10.

Sec. 86. Bond issues, etc., generally.

(1) The council may in the name and for the use of the city contract debts and make and issue or cause to be made and issued as evidence thereof, bonds, notes or other obligations, upon the credit of the city or solely upon the credit of specific property owned by the city, or solely upon the credit of income derived from property used in connection with any public utility owned and operated by the city, such bonds and notes or other obligations to be either coupon or registered bonds, or coupon bonds with the privilege to the holder of having the same registered as to principal or as to both principal and interest. But except as provided in clause (4) of this section no debt shall hereafter be contracted for a longer period than that of the probable life of the work or object for which the debt is to be contracted, to be determined by the director of public works and by him certified as hereinafter provided. In determining the probable life or probable average life of works or objects as hereinafter provided, the director of public works shall not deem the life of the following classes of work or objects to exceed the following periods, namely: Roadways of streets having, at the time the debt is

contracted, railroad or street railway tracks thereon, fifteen years; roadways of all other streets, twenty years; schoolhouses, thirty years; other public buildings, forty years; iron bridges, thirty years; concrete bridges, forty years; parks or other real estate, fifty years; and all other works or objects not hereinabove specified, thirty years. In the event that a debt shall be authorized for purposes falling within two or more of the above-named classes, it shall be the duty of the director of public works to determine and certify as hereinafter provided the probable average life of the works or objects for which said debt is contracted, taking into consideration the nature of said works or objects and the portion of said debt applicable to said works or objects, respectively. The words "probable life," as herein used, shall be construed to mean the length of time that will probably elapse before any particular improvement (assuming it to be kept in reasonable current repair) will reasonably require replacement.

(2) No bond, note, or other obligation of the city shall hereafter be issued except as hereinafter provided in the case of temporary loans, unless and until there is filed with the city clerk a certificate from the director of public works in substantially the following form:

"I hereby certify that the probable life (or 'the probable average life') of the work or object (or 'the works or objects') for which the debt authorized by the ordinance entitled (naming it) is contracted is as great as the longest period fixed for the maturity of any obligation issued or to be issued under the same ordinance"; and the said certificate shall be conclusive.

(3) The maximum periods hereinabove fixed for the contracting of debts for the several purposes hereinabove set forth may be changed at any time by the General Assembly, or under its authority, as to any bonds to be issued after said change is made, and such change shall not be deemed to constitute an impairment of the obligation of the contract of the city as to any bonds theretofore issued.

(4) Notwithstanding anything in this section contained, it shall be lawful for the said city to issue, without the certificate of the director of public works above-mentioned, bonds, notes, or other obligations for the purpose of refunding, so far as necessary, any obligations of the city created before April first, nineteen hundred sixteen, but maturing thereafter, or for the purpose of refunding bonds of the city heretofore issued which mature not more than three years after the date of their issue; but no such refunding bonds, notes, or other obligations shall be issued for a period of more than twenty-five years, except that bonds issued for the purpose of refunding bonds of said city heretofore issued which mature not more than three years after the date of their issue may be issued for a term not exceeding thirty-five years; and all such refunding bonds shall conform to the requirements set forth in clause (5) or clause (6) hereof, as the case may be.

(5) Hereafter, except as provided in clause (6) of this section, no debt shall be contracted, nor any bond, note or other obligation of the city issued, except as hereinafter provided in the case of temporary loans, unless by the ordinance or ordinances authorizing the same there be required the annual or semiannual payment, as a sinking fund, to the board of sinking fund commissioners of the City of Norfolk of a sum, or sums, to be fixed in and by said ordinance or ordinances, which, if annually or semiannually paid as provided by said ordinance or ordinances, will (as shown by any sinking fund tables in accepted use among bankers), with interest at four per centum per annum thereon and upon the accumulations thereof, produce at the date of maturity of the bonds the amount of the debt to retire which said sinking fund was created; and the said amount shall be annually appropriated by the council and shall be paid annually if said amount shall have been fixed on the basis of annual payments, and semiannually if such amount shall have been fixed on the basis of semiannual payments; provided that after the sinking fund created for any issue of bonds shall equal the total amount of said issue, the obligation of the city to make further pay-

ments in respect thereof shall cease and determine, except to make good any losses to the said sinking fund, and any surplus funds in the hands of the sinking fund commissioners, and not needed to pay the principal and interest on any such issue, shall be paid to the city treasurer annually, at such time as the commissioners shall determine, to be credited to the general fund of the city. Not less than five nor more than six years after the date of each issue of bonds, notes or other obligations hereunder, it shall be the duty of the board of sinking fund commissioners to appraise at their fair market value, not exceeding par, the securities held in the sinking fund pertaining to that issue, and if it should then appear that the said fund, together with the further appropriations to be made thereto, and with interest at four per centum per annum upon said fund and the accumulations thereof and the appropriations thereto, will not be adequate to pay the said bonds, notes, or other obligations, at maturity, it shall then be the duty of the said board to determine and certify to the council the amount of such further annual appropriation as will, with interest and accumulations as aforesaid, be adequate for said purpose; and a similar appraisal, determination, and certification shall be made by the said board every five years thereafter during the term of the said issue; and the council and the city treasurer, respectively, shall rest under the same duty in respect of the appropriation and payment of said further sum or sums as in respect of the appropriation and payment of the sum originally provided for.

(6) In lieu, however, of creating a sinking fund, or sinking funds, as in clause (5) hereof provided, the city may issue bonds hereinafter called "serial bonds," payable in annual installments, the first of which shall be payable at any time within the fiscal year succeeding the fiscal year in which the said issue may be authorized; and the last of which shall be payable within the period of the probable life of the work or object for which the debt evidenced by said bonds was created, ascertained and certified as hereinabove provided. The several installments in which said serial bonds may be

payable may be equal or unequal as the council may prescribe; but, if unequal, the greatest of said installments shall not be more than double the amount of the smallest.

(7) All bonds issued after April first, 1916, shall be paid at their respective maturities, and, except in the case of obligations of said city issued after April first, 1916, and prior to the enactment of this Charter, which mature not more than three years from the date thereof, no refunding bonds shall be issued for the payment thereof; provided, however, that if for any reason there shall not at the time of the maturity of any such bonds be sufficient funds of said city available for the payment thereof, it shall be lawful for the city to borrow money and issue negotiable notes to the amount required to pay such maturing bonds, which bonds shall be paid out of taxes to be levied and collected within the three years next succeeding the year in which such notes were issued. The payment out of the proceeds of the sale of any bonds of temporary loans made in anticipation of the sale of such bonds shall not be deemed a refunding of such temporary loans within the meaning of this clause. If the council shall fail to make provision for the payment of any sinking fund installment required as to any bonds lawfully issued under this section, or of any installment of serial bonds lawfully issued under this section, and such default shall continue for sixty days, then, and in either of said events, the city treasurer shall, without further direction from the council, and notwithstanding any contrary direction from the council, pay such sinking fund or serial bond installments from moneys then in his hands, if sufficient; and, if not, then from the first moneys that shall come into his hands thereafter.

(8) Pending the issuance or sale of any bonds, notes or other obligations by this section authorized, or in anticipation of the receipt of taxes and revenues of the current fiscal year, or of either of the two fiscal years immediately preceding the current fiscal year, it shall be lawful for the city to borrow money temporarily and issue notes or other evidences of

indebtedness therefor, and from time to time to renew such temporary loans to be ultimately repaid from the proceeds of said bonds, notes or other obligations, or from the city taxes and revenues, as the case may be; provided that such temporary loans, including all renewals thereof, if made pending the issuance or sale of bonds, notes or other obligations, issued under clause (5) five or clause (6) six hereof, shall not be made for a period greater than three (3) years, nor shall they exceed in the aggregate at any one time the amount of such bonds, notes or other obligations remaining unissued and unsold; and temporary loans made in anticipation of the receipt of taxes and revenues of any fiscal year including all renewals thereof, shall not be made for a period greater than the period ending two years after the expiration of such fiscal year and shall not exceed in the aggregate at any one time the uncollected portion of the taxes and revenues in anticipation of which such notes or other evidences of indebtedness are issued. All such temporary loans shall be evidenced by instruments upon the face of which there shall be plainly written "temporary loans." No such loan made pending the issuance or sale of bonds, notes, or other obligations under the provisions of clause (5) five or clause (6) six hereof shall be valid unless the said bonds, notes or other obligations shall have been first legally authorized. The provisions of clauses (1) one to (6) six inclusive, of this section, shall not apply to said temporary loans.

(9) The credit of the city shall not, directly or indirectly, under any device or pretense whatsoever, be granted to or in aid of any person, association or corporation. The council shall not issue any bonds, notes or other obligations of the city, or increase the indebtedness thereof, to an amount greater than eighteen per centum of the assessed valuation of the real estate in the city subject to taxation as shown by the last preceding assessment for taxation; provided, however, that in determining the limitation of the power of the city to incur indebtedness there shall not be included the classes of indebtedness mentioned in numbered paragraphs

(1), (2), (3) and (4) of subsection (a) of section 10, article VII of the Constitution of Virginia.

(10) Bonds of the city, the principal and interest on which are payable exclusively from the revenues and receipts of a water system or other specific undertaking or undertakings from which the city may derive a revenue, or secured solely or together with such revenues, by contributions of other units of government, may be issued pursuant to the provisions of this Charter and any general law of the State of Virginia as the council may deem applicable with regard to the funds and revenues pledged, covenants by the city with regard to fees and charges and other matters required for the protection of bondholders, remedies of bondholders and appointment of a trustee as well as the right of such trustee to the appointment of a receiver. The provisions of clauses (5) and (6) of this section shall not apply to such bonds and the ordinance authorizing such bonds shall not be subject to a vote of the qualified voters. Such bonds shall not be a debt of the city and the city shall not be liable thereon except to the extent set forth in the ordinance pursuant to which the bonds are authorized and in no event shall such bonds be payable out of any funds other than those referred to in such ordinance. The bonds shall not constitute an indebtedness within the meaning of any debt limitation or restriction.

(10-a) Bonds pledging the full faith and credit of the city authorized by an ordinance enacted in accordance with article 7 of the Constitution of Virginia and approved by the affirmative vote of the qualified voters of the city voting upon the question of their issuance, for a supply of water or other specific undertaking from which the city may derive a revenue, may be issued without being included in determining the limitation on indebtedness set forth in clause (9) of this section and in article VII, section 10 of the Constitution of Virginia, but from and after a period to be determined by the council not exceeding five years from the date of such election, whenever and for so long as such undertaking fails to produce sufficient revenue to pay for the cost of operation and

administration (including interest on bonds issued therefor), the cost of insurance against loss by injury to persons or property, and an annual amount to be placed into a sinking fund sufficient to pay the bonds at or before maturity, all outstanding bonds issued on account of such undertaking shall be included in determining the limitation on indebtedness set forth in clause (9) of this section and in article VII, section 10 of the Constitution of Virginia.

(11) Every ordinance authorizing the issuance of bonds shall specify the purpose or purposes for which they are to be issued, the aggregate amount of the bonds, the term for which they shall be issued, and the rate or maximum rate of interest to be paid thereon. Any such ordinance may be amended by ordinance at any time before the bonds to be affected by such amendment have been sold. All other matters relating to such bonds may be determined by resolution, within the limitations prescribed by such ordinance or by this act.

(12) All bonds shall be under the seal of the city and shall be signed by the city treasurer or one of his deputies and by such other officer or officers of the city as may be designated in the ordinance authorizing the bonds. If such ordinance shall so determine, the officer or officers signing the bonds, other than the city treasurer or his deputy, may sign the bonds by their facsimile signatures, in lieu of manual signatures; but the signature of the city treasurer or his deputy on such bonds shall be in his own proper handwriting. Coupons attached to a bond shall be authenticated by the facsimile signature of the city treasurer. (Acts 1918, ch. 34, p. 72; Acts 1932, ch. 93, p. 87; Acts 1950, ch. 436, p. 855; Acts 1964, ch. 23; Acts 1972, ch. 706, § 1.)

Editor's note.—Acts 1932, ch. 93, p. 87, amended clause (8) by including in the revenues in anticipation of which temporary notes might be issued those of the two fiscal years immediately preceding the current fiscal year, and extended the period for which temporary loans may be made. A comparison of the old and new sections is necessary to ascertain the changes made by Acts 1950, ch. 436, p. 855. Acts 1964, ch. 23, provided for the disposition of surplus funds in the hands of

PETITIONERS' REPLY TO THE CITY'S MEMORANDUM OF LAW

NOW COMES the Committee of Petitioners, in response to the Memorandum in support of the City's motion to vacate, and submits the following reply memorandum.

This reply will succinctly respond to each substantive point raised by the City, in the order found in the City's Memorandum. In addition, the Committee will offer alternative proposals to solve any logistical problems associated with the holding of Initiative Election pursuant to the petition of the Committee.

The Committee hereby respectfully moves the Court to disregard and strike out the following extraneous matters found in the City's Memorandum. At pages 20 and 21, the City discusses bond matters which involve factual evidence not before the Court, including the implication that the tax rate proposed by the Committee would not raise sufficient revenue. It is respectfully submitted that these factual issues are beyond the scope of the case pending before the Court. Secondly, at page 27 of the City's Memorandum, the City Attorney has violated the ruling he sought from the Court at the hearing in this matter on April 16, 1979, at which time the City Attorney moved the Court to exclude from its consideration any history of the amendment of Section 24.1-165 of the Code of Virginia (1950), as amended, beyond the four corners

of the Statute and the Legislative Journals. The final paragraph on page 27 injects the City's version of those facts which Counsel for the Committee proposed to represent to the Court, and draws an unwarranted conclusion from these extraneous statements of alleged fact. Abiding by the Court's ruling, counsel will not comment upon the facts, and asks that the City's statement as to this matter be stricken and disregarded.

Pursuant to proper judicial procedure, the Committee respectfully requests that the Court take judicial notice of certain well known facts, to-wit: That the election to fill the unexpired term on the Norfolk City Council of The Honorable Joseph A. Jordan was held on May 2, 1978, pursuant to the procedures outlined in Norfolk City Charter Section 7, and in apparent conflict with the procedure set forth in Section 24.1-76 of the State Code. That the City of Hampton conducted a special referendum election concerning the "Virginia Sunday Closing Law," on December 19, 1978, utilizing paper ballots while voting machines were impounded.

I N D E X

	Page No.
INTRODUCTION	1
INDEX	3
ARGUMENT	
I. THE PEOPLE OF NORFOLK ARE ENTITLED TO INITIATE AN ORDINANCE SETTING THE REAL ESTATE TAX RATE FOR THE CITY.	4
A. The Constitution of Virginia vests all power in the people, who have reserved certain powers.	4
B. Taxation is a Legislative function, therefore, subject to initiative.	7
C. Persuasive Authority Supports Initiative Elections on Tax Measures.	11
II. INITIATIVE DIFFERS FROM REFERENDUM, AND IS PERMITTED AND GOVERNED BY THE NORFOLK CITY CHARTER.	15
III. THE CLERK HAS PERFORMED HIS DUTY UNDER NORFOLK CITY CHARTER SECTION 32.	18
IV. THE TIMING OF AN INITIATIVE ELECTION IS GOVERNED BY CITY CHARTER, NOT GENERAL STATE LAW.	20
V. A DESCRIPTIVE TITLE HAS PREVIOUSLY BEEN PROVIDED AND SHOULD BE PUBLISHED WITH THE PROPOSED ORDINANCE AS REQUIRED BY CHARTER.	22
VI. ALTERNATIVE PLANS FOR SCHEDULING AND CONDUCTING THE ELECTION.	24
CONCLUSION	26

1. THE PEOPLE OF NORFOLK ARE ENTITLED TO INITIATE AN ORDINANCE SETTING THE REAL ESTATE TAX RATE FOR THE CITY.

A. The Constitution of Virginia vests all power in the people, who have reserved certain powers.

Influenced by the thinking of Thomas Jefferson, author of the Declaration of Independence and the Virginia Bill for Establishing Religious Liberties, George Mason drafted the Declaration of Rights, which has survived without substantial alteration through the entire history of Virginia, and includes, in Article I, Section 2, of the Constitution of Virginia (1971 revision), the following statement:

> "That all power is vested in, and consequently derived from, the people, that magistrates are their trustees and servants, and at all times amenable to them."

In almost the same breath, George Mason said, in Section Six:

> "That all elections ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage, and cannot be taxed, or deprived of, or damaged in, their property for public uses, without their own consent, or that of their representatives duly elected, or bound by any law to which they have not, in like manner, assented for the public good."

In contradistinction to the philosophical viewpoint of the City as stated in pages 21 and 22 of its Memorandum, the Colorado Court of Appeals saw the same nexus between the power of the people and the right to vote, in the case of City of Aurora v. Zwerdlinger, 558 P.2d 998 (Colo., 1976). After quoting language from the Colorado Constitution almost identical to that of Article I, Section 2 of the Virginia Constitution, the Colorado Court, consistent with prior rulings, said:

> "We view...the initiative and referendum, as fundamental rights of a republican form of government which the people have reserved unto themselves...and such a reservation of power in the people must be liberally construed in favor of the right of the people to exercise it. Conversely, limitations on the power of referendum must be strictly construed...Where the constitution protects fundamental values neither the legislature nor a home rule city has the power to act to infringe upon such values." 558 P.2d at 1000.

Not only do the guiding principles of Virginia Constitutional law reach to Colorado, they are likewise implemented in our neighboring states of West Virginia and North Carolina. The philosophical approach of the West Virginia Court is reflected in State v. City of Wheeling, 120 S.E. 2d 389 (W.Va.,1961):

> "It has been held that the people, through a municipal charter, have a right to vest in the voters of a municipality the authority to deal through initiative action with regard to any matter dealing with local affairs or municipal business, whether such affairs or business is legislative or administrative... These authorities simply hold that where an ordinance is couched in the language such as contained in Section II, Part I of the Charter of the City of Wheeling, which states that any proposed ordinance may be submitted to a vote of the people by petition thereunder, it "meant what is said", and should be construed literally. 62 C.J.S. Municipal Corporations Section 451b; State ex rel. City of Shreveport v. Dickson, La.App., 150 So. 574. (emphasis in original)

Likewise, the North Carolina Court in Purser v. Ledbetter, 40 S.E. 2d 702, 707 (N.C.,1946), discussed the philosophical rational of referendum, the first-cousin of initiative:

> "The referendum is definitely recognized as an instrument of democratic government, widely used, and of great value. Where it is adopted in the Constitution it is entitled to respect and should not be abridged by withdrawal from its processes of the subjects with which it was intended to deal."

While the general philosophy of government first articulated in Virginia has been applied to initiative and referendum cases throughout the nation, the Virginia Supreme Court has reached the issue only once, in the case of Whitehead v. H & C Development Corp., 204 Va. 144 (1963). While the case is not a constitutional watershed, it provides some practical guidelines to determining the scope and function of initiative.

B. Taxation is a Legislative function, therefore, subject to initiative.

Whitehead deals with ratemaking of a municipally owned waterworks system, as clearly distinguished from a taxing function. The Court turned to the common law construction of the power of initiative because the subject matter of the proposed initiative did not clearly fall within a traditional governmental function.

> "The City of Portsmouth owns and operates the waterworks system. As a general rule, a municipality acts and contracts in connection with the construction or operation of its municipal utility in its proprietary or individual capacity rather than in its legislative or governmental capacity, and is governed, for the most part, by the same rules that control a private individual or business corporation." 204 Va. at 150.

It was only after the activity had been classified as "proprietary" that the Court could clearly decide that it was executive or administrative in nature, and thereby beyond the scope of an initiative election. Thus, the rule of the case, by the Court's clear statement, is "a narrow one", holding as to the General Assembly's intent that "we do not think that it meant to provide a measure whereby local governments would be harassed and shackled in performing administrative and executive duties in connection with a commercial activity operated in a private or proprietary capacity." 204 Va. at 151 (emphasis added).

On the other hand, Whitehead holds that initiative and referendum procedures are applicable to acts which are legislative in character. This is the linchpin which enables the Committee of Petitioners in the instant case to be entitled to an election upon its proposed ordinance. The subject matter of the proposed ordinance is not a utility rate, not the city budget, and not the assessment of real estate, but it is an ordinance to levy the

The City's attempt to classify this taxation as administrative or executive in nature is comparable to empowering the President of the United States to promulgate the Internal Revenue Code, or to grant to the Governor of Virginia the power to set the rate of taxation upon property and income within the Commonwealth of Virginia. Looking to the Constitution of Virginia (1971 revision), nowhere in Article V can the power of taxation be found within the executive responsibilities. Rather, it is found within Article IV, Section 11, subject to the limitations of Section 14, entitled "Legislature" and Article X, Sections 1 and 4 where the general power of taxation is granted to the General Assembly and certain property, including real estate, is segregated for local taxation only, "in such manner and at such time as the General Assembly may prescribe by general law."

In an excellent Note, "Property Taxation in Virginia," 11 U.Rich.L.Rev.589, 591 (1977), the nature of property taxation in clearly set forth:

> "The power of property taxation is inherently enjoyed by the Virginia General Assembly. Since in its pristine form <u>this legislative prerogative is unlimited</u>, both the Constitution of the United States and the Virginia Constitution impose restrictions on its exercise. Article X, section 1 of the Virginia Constitution is one such restriction, embracing within its several significant limitations on the state's exercise of the taxing power. (P.591 emphasis added).
>
> Because the segregation provisions of the constitution are not self-effectuating, legislative action was necessary to implement them. Thus in sections 58-9 and 58-10 of the Code, the General Assembly codified the constitutional provision for segregation of certain classes of property to the localities for taxation and exercised its own power of segregation. Specifically, section 58-9

of the Code segregates to the localities for taxation the classes of property found in section 4, including all taxable real estate, coal and other mineral lands and tangible personal property, except the rolling stock of public service corporations. In addition, pursuant to its power of segregation, the General Assembly has segregated merchant's capital solely for local taxation under Code section 58-9, thereby precluding state taxation of merchant's capital.

Although forbidden from taxing the locally segregated property, the General Assembly has not been divested of all power or control over this property. The constitution expressly gives to the legistature the right to prescribe the time and manner of assessment of the locally segregated property. Pursuant to article X, section 4, the legislature has statutorily delineated, inter alia, the power of localities to collect taxes in installments, the power to set penalties for failure to comply with local tax ordinances, the local officials' power to distrain and the power to impose different rates upon the classes of property segregated for local taxation by the constitution. The state has therefore retained procederal control of the local taxing power, notwithstanding the power to tax." P.593-4.

An examination of Title 58, chapter 17, of the Code of Virginia (1950), as amended, will demonstrate that the General Assembly has, pursuant to the Constitution , delegated its legislative function to the localities to act "by ordinance" in a legislative capacity for levying taxes. Levying property tax rates stands apart from budget making in Virginia law since tax rates may be altered during fiscal or calendar years.(Code§58-851.6,-.8)

The legislative nature of levying taxes has been recognized throughout our Court system. "A very wide discretion must be conceded to the legislative power of the State in the classification of states, callings, businesses or occupations which may be subjected to special forms of regulation or taxation through an exise or license tax." Tax Commissioners v. Jackson, 283 U.S.527, 537 (1931).

> "While section 168 of the Virginia Constitution provides that 'all property except as hereinafter provided shall be taxed,' it is well settled that this mandate is not self-executing. Legislation is necessary to carry it into effect and before a tax may be imposed the taxing official 'must be able to put his finger upon the letter of authority.'" Prince William v. Thomason Park, 197 Va.861, 867 (1956).

The action of the Albemarle County Board of Supervisors in adopting an assessment system was deemed to be "a legislative act by a local governing body", in the landmark case of Perkins v. Albemarle County, 214 Va.240, at 242 (1973), modified as to other matters, 214 Va.416 (1973). While Whitehead involved a subject matter requiring the Supreme Court to wrestle with the delineation of administrative as opposed to legislative functions, the Court established a clear authority for initiative elections where the subject matter is clearly legislative. A more legislative matter than taxation could not be presented.

C. Persuasive Authority Supports Initiative Elections on Tax Measures.

The City has cited numerous cases purporting to withdraw certain functions similar to the ordinance proposed in the instant case from the power of the people to legislate. The Whitehead case, previously discussed, established the rule controlling this matter. But there is no relationship between the subject matter of the election at issue in Whitehead and the instant case, and all other authority cited by the City is set in the unfamiliar context legal systems outside Virginia. Thus, the authority cited in the City's Memorandum is of questionable bearing, many of the cases dealing with such matters as zoning, cable television franchises, budgets, assessment, and employee salaries, as opposed to the levying of a tax rate, which is the only subject matter in the proposed ordinance. For instance, the case of Denman v. Quinn, 116 S.W. 2d 783 (Tex.,1938), deals with what is known as a "home rule city," referendum rather than initiative, the exception rule applying to legislation that was passed as emergency law, and is found in the framework of the Texas constitutional and statutory framework, which cannot be determined to be identical with that of the law and traditions of Virginia. Thus, it was accurately stated in McQuillin, Mun. Corps., 3rd Ed.,Vol.5, Section 16.57 at P.221:

> "As indicated in the footnote, opposite conclusions have also been reached as to whether propositions or measures involving questions of taxation are subject to initiative or referendum."

Decisions on both sides can be found even within the same state on the question of whether initiative and referendum apply to such subjects as zoning, salaries, budget and taxation. The treacherous task of interpreting the law of a foreign jurisdiction is illustrated in the case of Bayless v. Limber, 102 Cal. Rptr.647,at page 650 (Cal.App.,1972),a case strongly supporting the constitutional

right to initiative and referendum, which made the following distinction:

> "In making this contention respondents overlook the decisive fact that these cases involved general law cities while this case is concerned with a chartered city. In those cases it was held that zoning may not be done by initiative because the procedure leading to the enactment of an initiative ordinance is incompatible with that prescribed by statute for the enactment of zoning ordinances by a city council."

The leading jurisdictions in which initiative and referendum are allowed to operate with little restraint are Nebraska and Oregon. In both states, the Courts have consistently found that tax measures may be the subject of initiative and referendum. In State Ex Rel. Boyer v. Grady, 269 N.W. 73 (Nebraska,1978), the people of a municipality were allowed to vote on a municipal sales tax despite the argument, parallel to that appearing in the City's Memorandum, that only the governing body is granted authority to act upon taxation matters of this nature, citing the earlier case of Klosterman v. Marsh, 143 N.W. 2d744 (Nebraska,1966), in which the people were allowed to vote upon the state income tax law of Nebraska. The clear principle of Nebraska law is that taxation questions are not beyond the power of initiative, that any subject matter that is within the legislative power of the governing body is within the legislative power of the electorate where initiative is not expressly limited. It should be noted that Norfolk City Charter Section 30 places no express limits upon the subject matter of an initiative, stating "any proposed ordinance or ordinances, including ordinances for the repeal or amendment of an existing ordinance, may be submitted to the council by petition signed by qualified voters..."

An argument similar to the presented by the City is addressed and dismissed in the case of City of Aurora v. Zwerdlinger, 558 P.2d 998 (Colo.,1976):

> "The trial court, in justification of the limitation it placed on the referendum power, determined that 'as to fixing rates, it is almost impossible for an electorate to have or digest the necessary complicated data and facts to arrive at a proper judgment as to the correct and accurate schedule adequate to sustain, maintain and operate a utility system.' However, that conclusion was not predicated on any evidence, is without justification, foundation, or authority, and is totally irrelevant to the referendum right. In any event, if the people choose to vote down a rate increase, that is their prerogative.
>
> 'All political power is vested in and derived from the people; all government, of right, originates from the people, is founded upon their will only, and is instituted for the good of the whole.' Colo. Const.,Art. II, Sec. 1.

See also, Garbade v. Portland, 214 P.2d 1000,(Ore.,1950); State v. Carr, 203 S.W.2d 670, (Mo. 1947); and State Ex Rel. Pierce v. Slusher, 248P.358 (Ore.,1926); all permitting initiative or referendum to deal with tax measures. The only generalizations that can be drawn from a confusing and conflicting national perspective are clearly stated in 42 Am Jur 2d, "Initiative and Referendum", Sec. 9, at p.657:

> "The permissible scope of initiative and referendum has no limits except as stated in the provisions granting the respective powers. Generally, then, by the initiative, the people may enact laws on matters on which the legislature has not acted and may amend or even repeal laws already enacted by the legislature, and by the referendum, the people may act to prevent an enactment of the legislature from becoming effective and may also reinstate an act which the legislature has expressly repealed.
>
> A limitation on the field in which direct legislation, that is, initiative and referendum, is operative may be express or may arise by implication. Express

> limitations on the powers of the people of a state appear in the constitution of the state; express limitations on the powers of the people of a municipality may appear in the state constitution, the municipal charter, and in the general law of the state."

There being no limitation upon the power of initiative in the Norfolk City Charter provisions enacted by the General Assembly, they are limited only by the rule of Whitehead v. H & C Development Co., supra, requiring that the subject matter of initiative be legislative. The proposed ordinance is clearly within the legislative duty of levying taxes delegated by the constitution and by act of the General Assembly.

> "'The power of taxation is an inherent attribute of sovereignty, and is a legislative power that cannot be exercised by the executive or judicial branch of the government.' 1 Cooley, Taxation (4th) Ed.) Sec. 57,58." State v. Slusher, 248P.358 (Ore.,1926).

II. INITIATIVE DIFFERS FROM REFERENDUM, AND IS PERMITTED AND GOVERNED BY THE NORFOLK CITY CHARTER.

Reference is hereby made to the entire argument presented in Petitioners' Memorandum of Law heretofore filed in this case. With the augmentation of the following authority, it is clear that the General Assembly of Virginia has not expressly or by implication repealed the Norfolk City Charter provisions granting the right of initiative.

As was previously cited, there is clear delineation in general law for the difference between the terms "initiative" and "referendum." 42 Am Jur2d Sec.9, 'Matters Subject to Initiative and Referendum', supra, page 13. Accordingly, the General Assembly has followed precisely this general understanding of the two terms, providing for initiative in sections 30 through 34, and for referendum in sections 35 through 41 of the Norfolk City Charter. Then, beginning at section 42 of the Charter are general provisions relating to the mechanics and procedure for initiative, referendum and recall. Each is treated in the foregoing sections as a distinct creature of the law, and this distinction is recognized further in the general election law, Section 24.1-165 of the Code of Virginia (1950) as amended.

The 1976 session of the General Assembly amended Section 24.1-165, dividing the former first sentence into two sentences, in order to treat the procedure for "referendum" separately from elections on any "question or proposition". Acts of Assembly, 1976, Chapter 616, at Pgs. 830-831. Whereas negative words are used in the first sentence dealing with referendum to nullify contrary

provisions in City charters, no such negative language is found in the second sentence dealing with questions and propositions. The flaw in the City's argument is two-fold. The City confuses the proposition that initiative and referendum are philosophically linked and may be controlled by the same analysis in determining whether the subject matter is proper for initiative or referendum. But, there is a distinction in the purpose and mechanics of each of these forms of popular review of legislation, and they are each treated distinctly by both the Norfolk City Charter and Code Section 24.1-165. The second flaw is in the contention that "referendum" is not statutorily defined. In the context of this case, referendum is defined by Norfolk City Charter,and the Whitehead case, supra, provides a clear understanding that Virginia will recognize the general distinction between referendum and initiative previously cited.

As has previously been argued in the prior Memorandum, the Supreme Court of Virginia gives great deference to the provisions of City charters, when they are in apparent conflict with general state law. The rule, generally stated, is that "where two statutes are in apparent conflict, they should be so construed, if reasonably possible, so as to allow both to stand and to give force and effect to each." Scott v. Lichford, 164 Va.499, at 422-423 (1935). It is intended that special acts, especially City Charters, are to be treated as an exception to the general rule and will stand even though there is a general law conflicting therewith. "The last two mentioned cases are authority for the proposition that special charters of municipal corporations or amendments thereof conferring rights

and powers different from and in addition to those conferred by general statutes are authorized by the constitution when enacted in conformity with Article IV and Section 117 of the Constitution..." City of Portsmouth v. Weiss, 145 Va.94,at 107 (1926). The City has not cited any Virginia case in which a charter section was ruled to be superseded by a general state law.

Thus, the Norfolk Initiative Election procedure is not within the prohibition of Code Section 24.1-165.

III. THE CLERK HAS PERFORMED HIS DUTY UNDER NORFOLK CITY CHARTER SECTION 32.

While the City in its Memorandum has cited general authority and a code section relating to general election procedures, it has failed to address any relevant issue as to the performance by the Clerk of this Court of his duty under the Norfolk City Charter.

The only requirement under Section 32 is that "within ten days after the filing thereof, the said clerk shall ascertain and certify thereon whether the required number of qualified voters have signed the same. If it be found that the required number of qualified voters have signed the said petition, then the said petition, with the certificate of the said clerk thereon, shall be presented by said committee to the Corporation Court of said City..."

There must be a presumption that the certificate filed herein by the clerk is valid and sufficient. Charter Section 44 shifts the burden of proof to anyone who would challenge the petitions and the clerk's certificate:

> "All signatures to any petition mentioned in the preceding section hereof shall be accepted and treated as prima facie genuine...All such petitions substantially complying with the requirements of this Charter and certified by said clerk to bear the required number of signatures of qualified voters shall be accepted and treated as prima facie sufficient. The burden of proving the insufficiency of any such petition in any respect shall be upon the person alleging the same."

In light of the heavy presumption in favor of the signatures in petitions themselves, it is apparent that the committee of

petitioners and the clerk have "substantially complied" with the charter requirements, and the clerk has presumed the genuineness of the signatures on the petitions. He presumes that they were qualified, but his letter certifies that a sufficient number of signatures were obtained. In the absence of any present system of poll taxes mentioned in Section 44, the clerk was relieved of any necessity of determining anything other than the number of signatures presented on the petitions, and that the petitions substantially complied with all relevant sections of the City Charter. The clerk has certified these matters and unless his certification is challenged with evidence to the contrary, the petitions must be deemed sufficient as a matter of law.

IV. THE TIMING OF AN INITIATIVE ELECTION IS GOVERNED BY CITY CHARTER, NOT GENERAL STATE LAW.

Authority previously cited in this and the preceding Memorandum of Law will not be repeated, but there is ample authority in addition to that cited, which maintains the general principle that special laws prevail where there is an apparent conflict with the general, and this principle has been regularly applied to initiative and referendum proceedings.

> "...a general statute relating to elections, and providing for initiative and referendum, is not applicable to municipal referendum, for which special statutory provisions are made..." 62 C.J.S. Mun. Corps.,Sec.451,at P.869.

> "The people through their charter have a right to vest in the voters of the city the right and power to deal through initiative action with any matter within the realm of local affairs or municipal business, whether or not strictly legislative, as that term is generally understood..." 62 C.J.S. Mun. Corps., Sec. 454b.

> "Whether the power of initiative and referendum exists in any particuliar municipality depends, as noted above, upon the constitution, charter, or statute. But generally speaking, provisions for the power and its exercise, particuliarly with respect to home rule and larger cities, is to be found in charters, in the power and mode of its exercise are <u>governed by charter provisions rather than by statutes</u>, although they are governed by statutes where there are no charter provisions or to the extent that charter provisions are incomplete." 5 <u>McQuillin</u>, Mun. Corps.,Sec. 16.49,at P.201.

As the City has noted, repeal of a City charter by implication is not favored, and none of the cases cited by the City hold that any City charter provision has been repealed by implication where a general state law was passed at a later date and was in conflict therewith. In the case of <u>Scott</u> v. <u>Lichford</u>,

164, Va.419 (1935), a Lynchburg City Charter provision in conflict with a later enactment of the state code was permitted to stand, upon the following principle:

> "A later statute which is general does not repeal a former one that is particular unless negative words are used, or the acts are so entirely inconsistent that they cannot stand together. Thus laws existing for the benefit of particular municipalities ordinarily are not repealed by general laws relating to the same subject-matter. Stated in different phrase, where the subsequent general law and prior special law, charter or ordinance provisions do not conflict, they both stand, but this result must depend, of course, upon the legislative intent which is to be ascertained from an examination and comparison of the whole course of legislation relating to the subject under consideration." 164 Va. at 423.

Since the focus of the General Assembly in its 1976 amendment of Code Section 24.1-165 was upon prohibiting referendum, and since no similiar negative words were used in relation to "question or proposition", the Norfolk City Charter provisions as to the timing under which the Court should enter its order for election must govern. This was the practice, of which judicial notice is requested, in the conflict which arose in 1978 over the procedure for filling a vacancy on the Norfolk City Council. The same electoral board, the same state board of elections, and the same city government authorized and participated in the conduct of the election under Norfolk City Charter Section 7, which is in apparent direct conflict with the provisions of Section 24.1-76. The Norfolk City Charter is the state law governing the affairs of the Norfolk City government.

V. A DESCRIPTIVE TITLE HAS PREVIOUSLY BEEN PROVIDED AND SHOULD BE PUBLISHED WITH THE PROPOSED ORDINANCE AS REQUIRED BY CHARTER.

The petitions, filed with the clerk and bearing the signatures of qualified voters of the City of Norfolk, bear on the face of them a descriptive title, fully disclosing the nature of the ordinance printed on the reverse side of the petition. In addition, the committee of petitioners requested in its prayer of the previous Memorandum of Law that "the proposed ordinance, with an appropriate and descriptive title annexed thereto, be published as required by Section 2 of the Norfolk City Charter." The Court's order heretofore entered contains a question which fully describes the nature of the proposed ordinance annexed thereto. It is comtemplated that the further order of the Court, requiring publication of the proposed ordinance, as required by charter Section 32 would include a more formal title. The legislative process has not ended, and if there is any insufficiency in the title previously provided, it can easily be cured. To that end, the following title is hereby suggested, for purposes of the publication prior to the election:

> AN ORDINANCE TO AMEND AND REORDAIN SECTION 1, AS AMENDED BY ORDINACE NO. 28, 932, OF ORDINANCE NO. 24,116, ENTITLED "AN ORDINANCE IMPOSING AND LEVYING A TAX FOR THE CALENDAR YEAR BEGINNING JANUARY 1, 1968, AND ENDING DECEMBER 31, 1968, AND ALSO FOR EACH AND EVERY CALENDAR YEAR THEREAFTER BEGINNING JANUARY 1 AND ENDING DECEMBER 31 OF EACH SUCH YEAR, UNLESS OTHERWISE CHANGED BY THE COUNCIL ON REAL ESTATE WITHIN THE CITY OF NORFOLK", SO AS TO CHANGE THE RATE ON CERTAIN REAL ESTATE LOCATED WITHIN THE CITY OF NORFOLK TO ONE DOLLAR AND FIFTEEN CENTS ($1.15) FOR EVERY ONE HUNDRED DOLLARS OF ASSESSED VALUATION THEREOF.

It would be well to note that the practice in the State of Oregon is to have judicial review of ballot titles prior to election on the issues, and any deficiency is cured prior to the election, which would be the stage in which the present case is postured. Garbade v. Portland, 214 P.2d 1000 (Ore.,1950). In addition, the Supreme Court of Virginia has expressly stated the view that matters of form are not to control over substance, if they are not material and can be cured. Taxpayers v. Board of Supervisors, 202 Va.462 (1961).

VI. ALTERNATIVE PLANS FOR SCHEDULING AND CONDUCTING THE ELECTION.

Upon resolution of the legal issues presented to the Court, it must be determined whether the election will be held (a) on May 15, 1979 as originally prescribed in the Court's order, (b) at some later date, pursuant to City charter, or (c) at some later date following state law.

While the committee of petitioners is concerned that the election be held within the sixty days provided by City charter, its overriding concern is that the election be held properly, consistent with the controlling law, and without undue burden upon public resources.

If the Court should follow option (a) or (b), prior to the end of the current city fiscal year of June 30, 1979, the Norfolk voting machines would not be available because of the scheduling of a primary election on June 12, 1979. The Norfolk Electoral Board is authorized by state law to utilize paper ballots, and the Court is asked to take judicial notice that a nearby jurisdiciton recently conducted a special election by paper ballot for the same reason of scheduling conflicts, in Hampton.

Therefore, it would appear that the Court has an option, if it should not reinstate its order scheduling the election for May 15, 1979, of ordering the election to be held June 26, 1979, with the order being entered on April 27, 1979, thus satisfying both Norfolk City Charter and general state election law by the sixty day interval.

A more desirable alternative, which would be based solely

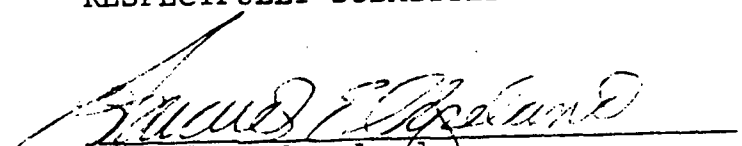
upon following the special law of this jurisdiciton, would be to enter an order not later than May 13, 1979, preferably sooner, setting the election on this initiative for June 12, 1979, at the same time and with the same machinery as will be used in the party primary set for that date. While this provides another point of conflict with general state law, the proposal is premised on the Court finding that the Norfolk City Charter does indeed prevail over general state election law. Thereby, the expense of an election, estimated to be between $30,000 and $40,000 would be avoided, by placing both ballots on the same voting machine.

The wisdom of the latter proposal is that it presents no difficulty to the Norfolk Electoral Board as to closing the books for registration thirty days prior to each election, duplicating the expense and work of two elections, being subjected to the unnecessary strain of preparing machines twice, or of conducting a paper ballot election; it would preserve the principle of honoring City charter provisions; it would accomplish an economy in the cost of election that is the hallmark of the concern of this City; and it might promote greater participation by the voting public in the initiative election if it were held in conjunction with a regularly scheduled election. The committee of petitioners, therefore, unanimously have concurred in proposing that the election be held on June 12, 1979.

CONCLUSION

For the foregoing reasons, the Committee of Petitioners respectfully requests that the Court reinstate or modify its order for a special election, and direct the clerk of the Court to publish notice of the proposed ordinance and the date set by the Court for the election to be held in this matter.

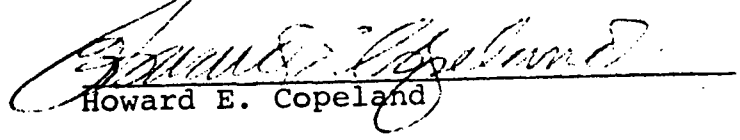
RESPECTFULLY SUBMITTED



Howard E. Copeland,
for the Committee of
Petitioners

CERTIFICATE

I hereby certify that I mailed or hand delivered a true copy of the foregoing Petitioners' Reply to the City's Memorandum of Law, to The Honorable J. Marshall Coleman, Attorney General of Virginia, Lawrence C. Lawless, Counsel of the Norfolk Board of Elections, and Philip R. Trapani, City Attorney, City of Norfolk, on this 23rd day of April, 1979.



Howard E. Copeland

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

IN RE: INITIATIVE ELECTION C-431-79A

SUPPLEMENTAL MEMORANDUM IN SUPPORT
OF THE CITY'S MOTION TO VACATE

Philip R. Trapani
City Attorney
R. Barrow Blackwell
Assistant City Attorney
Mary L. G. Noxsen
Assistant City Attorney
903 City Hall Building
Norfolk, Virginia 23501

Of counsel for the City of Norfolk

CITY OF NORFOLK

1. THE AUTHORITY OF TAXATION, WHICH IS DERIVED FROM THE CONSTITUTION OF VIRGINIA AND GRANTED BY THE GENERAL ASSEMBLY, IS VESTED SOLELY IN THE ELECTED REPRESENTATIVES OF THE CITY AND CANNOT BE DELEGATED TO ANY OTHER BODY.

The Constitution of Virginia, in Article VII, Section 2, provides that:

> ...the General Assembly may provide by special act for the organization, government, and powers of any county, city, town, or regional government, including such powers of legislation, taxation, and assessment as the General Assembly may determine....

The authority of taxation which was granted to the City of Norfolk by the enactment of Charter Section 2(1) provides that the City shall have the power:

> To raise annually by taxes and assessments in said city such sums of money as the council hereinafter provided for shall deem necessary for the purposes of said city, and in such manner as said council shall deem expedient, in accordance with the Constitution and the laws of this state and of the United States....

This specific authority of the city council to determine and effect necessary taxation has existed continuously since the Norfolk City Charter was enacted by the General Assembly in 1918.

Section 7 of Article VII of the Constitution sets forth the procedure which must be followed by governing bodies in enacting any ordinance or resolution which imposes taxes:

> No ordinance or resolution appropriating money exceeding the sum of five hundred dollars, imposing taxes, or authorizing the borrowing of money...shall

> be passed except by a recorded affirmative vote of a majority of all members elected to the governing body. (Emphasis supplied.)

This procedural requirement is unique in state constitutions. A.E. Dick Howard, in his Commentaries on the Constitution of Virginia, notes that the provision was included in the Virginia Constitution in 1902 as "both the Commission on Constitutional Revision and the General Assembly felt that procedural requirements would provide a basic safeguard for the fiscal integrity of local government." Commentaries, supra, at p. 846 (1974); Committee on Constitutional Revision, at p. 236; 1901-02 Convention Debates, II, 1953, 1955-60, 2032.

The Constitution, in Article X, structures the way in which the State may exercise its power of taxation and provides that the General Assembly shall determine upon which subjects local taxes may be levied. Historically, the issue of who held the power to impose taxes was addressed by the colonists in Virginia, and, as early as 1624, the Virginia Assembly adopted an act "that the Governor shall not lay any taxes upon the colony, their lands or commodities, other than by the authority of the General Assembly, to be levied and employed as the said Assembly shall appoint. Acts of Assembly 1623-24; Howard, p. 1009. The colonists contended that the members of Parliament were not authorized to tax those people whom they did not represent and it naturally followed that taxation could not be imposed except by an elected body which directly represented all of the taxpayers.

CITY OF NORFOLK

It is well established that the power of taxation is peculiarly and exclusively legislative and the control and discretion of tax matters is vested in that branch of the government. Fallon Florist, Inc. v. Roanoke, 190 Va. 564 (1950); Griffin v. Bd. of Supervisors, 203 Va. 321 (1962), 71 Am.Jur.2d, State and Local Taxation, §§72 and 73.

The power to assess and collect taxes is a function of the legislative body of the state, or of the locality when the locality has been authorized by the General Assembly by a special act in the form of a city charter. Norfolk Charter Section 2(1) specifically authorizes the City to raise, by taxes and assessments, such money as City Council determines to be necessary for the purposes of the City, and in such manner as Council shall deem expedient. To that end, Norfolk City Council presents for public comment and adopts an annual budget, and based thereon later adopts an appropriation ordinance wherein the tax rate deemed necessary to fund the City's annual budget is set forth.

> When a legislative act of the state is the source of municipal power to tax, and the act indicates the manner in which the power is to be exercised, the local government must exercise its delegated power to tax in strict conformity with the methods prescribed in the state legislative act. Consolidated Diesel Electric Corp. v. Stanford, 156 Conn. 33, 238 A.2d 410, 411-412 (1968); Antieau, Municipal Corporation Law, Vol. 2A, §21.06.

Charter Section 2(1) establishes the manner in which the City Council shall decide how much money must be raised through taxation in order to manage the affairs of the City and Article VII,

Section 7, of the Virginia Constitution mandates the prescribed method of an affirmative vote of the majority of all members elected to the governing body before a tax may be imposed.

Because of the degree of skill and type of knowledge which are required in the complicated business of municipal budgeting, certain persons must be informed in and entrusted with making such determinations.

> Municipal taxes must be levied by the designated public authority, e.g., the municipal council, or governing legislative body, as the municipal assembly, and the power, like similar powers requiring the exercise of judgment and discretion, cannot be delegated. The officers designated to make the levy, and no others, should act. 16 McQuillin, Mun. Corps., §44.96 at p. 273; Griffin v. Bd. of Supervisors, 203 Va. 321 (1962); Rhodes v. Stuttgart, 192 Ark. 822, 95 S.W.2d 101 (1936); Durham Navigation Corp. v. Bayonne, 10 N.J. Misc. 1152, 162 A. 656 (1932).

Inquiries have been addressed to the Attorney General concerning the proper body to exercise the power of taxation in a locality. In 1951, an opinion was issued in response to a question about an increase in the proposed tax levy for Prince William County. Under the theory of Article VII, Section 7 of the Constitution, the Board of Supervisors was the body responsible for publishing notice of the proposed tax increase, holding one or more public hearings, preparing and taking action on the final budget. Vol. 15, Opinions of the Attorney General, 1950-51, p. 38. Two other opinions have considered whether or not school boards could levy taxes in order to finance the educational needs of a community. The power to tax real estate and to appropriate

the proceeds of such taxes for various purposes "is reserved to the governing bodies of counties, cities and towns by Section 7 of Article VII of the Constitution," (as previously quoted). Vol. 36, Opinions of the Attorney General, 1971-72, p. 353-4; Vol. 39, Opinions of the Attorney General, 1974-75, p. 364.

It is generally agreed that the fixing of a tax is one of the highest functions of a municipal governing body and "in performing this function, public officers should employ judgment and discretion to safeguard the interest of the taxpayers, as well as to protect the credit of the city." 16 McQuillin, Mun. Corps., §44.97 at p. 275; Bd. of Equalization of City of Fort Worth v. McDonald, 129 S.W.2d 1135 (Tex.Com.App. 1939). Legislators bear the responsibility for addressing taxation matters on behalf of the citizens and once the statutorilly-required public hearings on the proposed budget have been properly held, and citizen comment has been considered, the amount of the tax levy is within the sole discretion of the legislative officials and their exercise of that discretion is not subject to judicial interference. People v. Edward Hines Lumber Co., 385 Ill. 366, 52 N.E.2d 720 (1944); Stembler & Ford, Inc. v. Mayor and Common Council of Capitol Heights, 221 Ind. 113, 156 A.2d 430 (1959). The power of taxation is vested exclusively in the legislative branch of government and may be exercised to the utmost extent with respect both to the subjects of taxation and amount of tax due on each taxable entity.

CITY OF NORFOLK

Arlington County v. Foglio, 215 Va. 110 (1974). The Supreme Court of Virginia, in the case of Bradley & Co. v. City of Richmond, 110 Va. 521 (1910) maintained that the power of taxation is solely the province of legislators and noted that:

> Where the power to tax for revenue purposes exists, the amount of the tax is in the discretion of the legislative body, and it may be carried to any extent within the jurisdiction of the state or corporation which imposes it which the will of such state or corporation may prescribe. Id. at p. 525.

In exercising the taxing power, the City of Norfolk is a mere agency for and subdivision of the Commonwealth of Virginia and has only such authority as is specifically conferred by the General Assembly. Whiting v. West Point, 88 Va. 905 (1892); Southern Ry. Co. v. City of Danville, 175 Va. 300 (1940). Relying on Article VII, Section 2 of the Constitution, the Legislature enacted Charter Section 2(1) and empowered the City of Norfolk to levy taxes for its support. Evidencing further concern for the fiscal policies of the state and its localities, the Assembly requires every governing body to obtain majority affirmation of its elected legislators in order to adopt tax ordinances and resolutions. Municipal corporations, in and of themselves, have no power of taxation and the laws conferring such powers on them must be strictly construed. Richmond v. Valentine, 203 Va. 645 (1962); 13B Michie's Juris., Mun. Corps., §115. The City Council, then, is charged with the duty of functioning as a legislative body in the setting of the tax rate necessary to meet

CITY OF NORFOLK

the financial obligations of the City. That responsibility has been conferred by the State and cannot be delegated to another branch of government or to citizens who may question the judgments of officials whom they have elected to discharge that responsibility on behalf of the City.

II. THE CASES RELIED UPON BY PETITIONER IN ITS ORIGINAL MEMORANDUM ARE NOT DISPOSITIVE OF THE CONTROLLING LEGAL ISSUES OF THIS CASE.

In its Memorandum of Law filed with the Court on April 9, 1979, the Committee of Petitioners frames three questions which it contends bear directly on the legality of holding the Initiative Election on May 15, 1979. It is respectfully submitted, however, that only one question raised and argued by Petitioners is of consequence to the case at bar, and the City has addressed this issue in its Memorandum, filed with the Court on April 16, 1979. To the extent that this issue, and the additional two questions raised by Petitioners, require further response, they are dealt with seriatim.

I. Is the Norfolk Charter presumed to be properly enacted, constitutional and valid?

This question, so framed, answers itself. The City does not challenge the validity and constitutionality of its Charter. This fact, however, is in no way dispositive of whether

later general law, as set forth in Section 24.1-165, Code of Virginia (1950), as amended, has superseded and repealed Charter §32, or whether the subject matter of this Initiative Election, i.e., reduction of the City's real estate tax rate, is proper as a matter of law.

II. Does Norfolk Charter Section 32 violate Virginia Constitution Article IV, Section 14(11)?

Petitioners have cited a number of cases to support their contention that Charter §32 is not violative of Article IV, Section 14(11) of the Virginia Constitution. To the extent these cases are cited in support of any other proposition, in particular, that Charter §32 prevails over conflicting general law, reliance on these cases by Petitioners is sorely misplaced.

Article IV, Section 14 provides in pertinent part:

> The General Assembly shall not enact any local, special, or private law in the following cases:
>
> * * *
>
> (11) For registering voters, conducting elections or designating the places of voting. (Emphasis supplied.)

The cases of Porter v. Joy, 188 Va. 801 (1949), Fallon Florist v. City of Roanoke, 190 Va. 564 (1950), Pierce v. Dennis, 205 Va. 478 (1964) and Portsmouth v. Weiss, 145 Va. 94 (1926), all cited by the Petitioners, involved only the issue of whether particular statutes, either general or special, offended Section 63 (64) of the Virginia Constitution, the predecessor of Article

IV, Section 14. None of these cases stands for the principle that Charter sections, or special laws, necessarily prevail over general laws in conflict therewith, as is suggested at pages 10-11 of the Petitioners' Memorandum. In the cases of Fallon Florist, supra, and Pierce v. Dennis, the offending statutes were held to be valid legislation enacted pursuant to then Section 117 of the Virginia Constitution, the predecessor of Article VII, Section 2 of the present Constitution, which authorized special laws for the "organization and government of cities and towns," in the manner provided therein. In Porter v. Joy, supra, the Court found that the local statute, which provided for a county manager form of government in Arlington County upon approval by a majority of its voters, simply was not a local law respecting the "conducting of elections." Finally, in Davis v. Dusch, 205 Va. 676 (1964), the authority of the Virginia Beach City Council, granted under its Charter, to reapportion itself and order the election of a new Council, was held not to be a special law "for conducting elections." Additionally, the Court held that this Charter section prevailed over two general laws in conflict. However, this result was not predicated on any rule of law that special acts necessarily prevail over general ones, but is based entirely on construction of the constitutional provisions from which these conflicting special and general statutes emanated. The Charter section in issue was adopted pursuant to Article VIII, Section 117 of the Virginia Constitution, while the general laws, Sections 15.1-803 and 15.1-806, requiring different methods

and times of reapportionment, were enacted to give effect to Article VIII, Section 121, which provided generally as to how councils were to be elected and their powers and duties as to reapportionment. Resolution of the conflict between the Charter section and these general laws turned not on any rule of construction respecting the special-general dichotomy, but rather on the language of Article VIII, Section 117, which provided that the authority of the General Assembly to enact special laws with regard to cities shall be, "unaffected by any of the provisions of this article." Thus, legislation enacted pursuant to Section 117, i.e., the Virginia Beach Charter, was unaffected by the provisions of Section 121 of the same article, Article VIII, and the general laws giving effect thereto.

It is manifest that these cases turn on narrow questions of constitutional construction and are of limited application to the case at bar. Each case is concerned only with the power of the General Assembly to enact local or special legislation, and not with the issue of implied repeal of special acts by later general laws, which issue is germane to the case at bar. Therefore, to rely on these cases as general support for the proposition that special laws enacted pursuant to Section 117 of the Virginia Constitution, and its successor, Article VII, Section 2, necessarily prevail over general laws respecting the same subject matter is to misread and misapply them.

CITY OF NORFOLK

III. Does Charter Section 32, a special act, prevail over Virginia Code §24.1-165, a general law?

In addition to the inapposite and readily distinguishable cases of Pierce v. Dennis, supra, and Davis v. Dusch, supra, the Petitioners cite in thier Memorandum the case of Dominion Chevrolet v. Henrico, 217 Va. 243 (1976) for the rule that special laws govern general acts. Again Petitioners' reliance on this case is entirely misplaced. The apparent statutory conflict in Dominion Chevrolet was not between a special law and a general act, but between two general provisions of the Code of Virginia. As the Court stated at 217 Va. 243:

> The sole issue here is whether a failure by a taxpayer to comply with the provisions of Code §15.1-554 bars the maintenance against a county of an application under the provisions of Code §58-1145, et seq., for the correction of an erroneous assessment and for a refund of taxes. (Emphasis supplied.)

The Court read Code §15.1-554 as relating to general claims and demands against a county arising out of transactions, disputes and matters incident to the operation of the county board, whereas Code §58-1145 related to the specific area of taxation and afforded a particular remedy. This case did not turn on statutory construction principles applicable to conflict between special and general laws, such as is presented in the case at bar, and which is discussed in Section II of the City's original Memorandum. The case of Dominion Chevrolet, like the cases previously cited by Petitioners and discussed herein, does not

stand for the principle for which it is cited, and is clearly not dispositive of the issues raised by the City in its Motion to Vacate now pending before the Court.

Finally, while the City has, it is respectfully submitted, set forth in its original Memorandum the applicable principles of statutory construction which compel the conclusion that Virginia Code §24.1-165 controls in the instant case, two additional cases in this regard are instructive. At issue in School Board v. Town of Herndon, 194 Va. 810 (1953) was whether a later enacted general law superseded and repealed by implication a special act expressly respecting the Town of Herndon. This special legislation provided that the Town of Herndon was established as a separate school district and was entitled to representation on the School Board of the County of Fairfax. General law, however, provided for an executive form of government for Fairfax County and that all members of the Fairfax County School Board were to be appointed by the county supervisors except where a town located in the county is operated as a separate school district, under a town school board. The Town of Herndon was not so operated. The Supreme Court found an "irreconcilable conflict" between these special and general provisions. While the special act provided without qualification that the Town of Herndon was to be represented on the County School Board, the general law only permitted such representation where a town was operated as a separate school district under a town school

CITY OF NORFOLK

board. 194 Va. at 817. The Court held that the general law impliedly repealed the inconsistent special legislation, stating at 194 Va. 816:

> ...No ordinary case of repeal by implication is presented, but one which unerringly prompts the belief and makes certain the conviction that the legislature manifestly intended that the comprehensive act should prevail over the special legislation and be thus given full force and effect when the new government became operative. If not, the contemplated reorganization and new scheme of government as voted in would be materially impaired.

Nor does the case at bar present an ordinary case of repeal by implication. As was discussed in detail at pages 31-36 of the City's original Memorandum, the intended uniformity of state election law found in Section 24.1-165, on statewide general and primary elections, cannot be given full force and effect if myriad earlier special laws, such as those exemplified by Charter §32, are permitted as continuing exceptions.

Thus, in City of Petersburg v. General Baking Co., 170 Va. 303 (1938), the Supreme Court held that a city charter provision empowering the city to impose a license tax upon hawkers and peddlers did not except the city from a later general law prohibiting cities and towns from imposing a license tax on those businesses exempted from a State license. The Court found the language of the exemption provided by general law to be unequivocal and manifestly inconsistent with the power of the city under its charter to impose a license tax, stating at 170 Va., 311:

> The mere fact that the charter of the city of Petersburg states that the city may impose a license tax upon hawkers and peddlers is not sufficient to except the city of Petersburg from the operation of the 1932 amendment. The evident purpose of this amendment was to extend the policy of exemption to all towns and cities within the State. While the amendment enacted subsequent to the charter provision contains no words expressly repealing all acts in conflict therewith, full force and effect can not be given to the language of the general statute, unless it is held to apply to all cities and towns. "It is said that repeal by implication is not favored, and that statutes apparently in conflict are to be reconciled when possible. These are propositions at this late date not questioned; but where the implication is inevitable it has all the force of an express declaration." (Emphasis supplied.)

This result was reached even though the general law contained a saving provision which stated that no other sections of the Virginia Code or acts of assembly are repealed by the general law in question "excepts such sections or acts as are specifically repealed hereby." (Emphasis supplied.)

From the foregoing, it is evident that a charter provision which contravenes a later general law is impliedly repealed thereby where the earlier special law is manifestly inconsistent with the later general act, or the general act is intended to cover the whole subject matter of the legislation. The time period within which Charter §32 permits an initiative election is in irreconcilable conflict with the time frame provided in Virginia Code Section 24.1-165 for holding such an

election. In addition, it is evident that Section 24.1-165, by its language and its subject matter, is intended to cover fully the time limitations for such election and to prevail over any similar special legislation.

CONCLUSION

For the foregoing reasons, and those discussed in the City's Memorandum in Support of its Motion to Vacate, heretofore filed with the Court, the City of Norfolk respectfully submits that its Motion to Vacate should be sustained.

Respectfully submitted,

CITY OF NORFOLK

By _____
Philip R. Trapani
City Attorney

I hereby certify that on the 25th day of April, 1979, a true copy of the foregoing Supplemental Memorandum in Support of the City's Motion to Vacate was hand delivered to Howard E. Copeland, Esquire, 5291 Greenwich Road, Virginia Beach, Virginia, 23462, of counsel for petitioners.

_____
Philip R. Trapani
City Attorney

CITY OF NORFOLK

1 clerk's certification of the petitioners, the
2 thrust of the Charter is to have the clerk
3 review the petitions and find out and report
4 to the court whether there are sufficient
5 signatures. The clerk, as Mr. Trapani has said,
6 has done that. In addition to that I point out
7 that section forty-four says that all signatures
8 to any petition mentioned in the preceeding
9 section hereof shall be accepted and treated
10 as prima facie genuine. It goes on at the
11 end of that section to say the burden of proving
12 the insufficiency of any such in petition --
13 THE COURT: How about what it says in
14 between.
15 MR. COPELAND: Oh, yes, sir. I followed
16 the logic of the City Attorney and it sounds
17 to me that because the pole tax is no longer
18 effective and because there is no other procedure
19 provided in our Charter that there is no way
20 that the names can be certified. Therefore --
21 THE COURT: I don't think he said that, sir.
22 MR. COPELAND: I think that's logic.
23 THE COURT: No, I don't think he said that
24 at all.
25 MR. COPELAND: I'm sorry. In his memorandum

1 he has suggested that it was required for the
2 clerk to utilize the voter registration system
3 that is available but no where is there any
4 citation of a requirement that he so utilized.
5 THE COURT: What would you suggest ought
6 to be done in view of the fact we don't have a
7 pole tax and we don't have registration based
8 upon pole tax? How should it be certified?
9 MR. COPELAND: Your Honor, the procedure
10 as I understand the Charter is that the clerk
11 of the court receives a bundle of petitions. He
12 looks at them for the form to see if they are
13 not -- to see if they appear to have the date
14 that's required to be next to the names and
15 addresses and then he counts them. And he presumes
16 that they are genuine and he certifies to the
17 court whether or not the requisite number are there.
18 I think the clerk's done that.
19 THE COURT: He certifies that they were
20 genuine signatures in terms that they are not
21 forgeries. He also has to certify whether they
22 are qualified voters.
23 MR. COPELAND: And I think he is entitled
24 to presume --
25 THE COURT: Are you saying that I could go

1 out here to Virginia Beach and get two thousand
2 or four thousand signatures of Virginia Beach
3 voters, bring them into the clerk and the only
4 thing he's suppose to do is close his eyes and
5 as long as he's satisfied there's no forgeries,
6 bingo, they are qualified voters of the City of
7 Norfolk? Are you saying that's all the clerk's
8 got to do?
9 MR. COPELAND: Your Honor, I would respond
10 in this manner. Two levels. First of all, the --
11 I think at that point if someone doubts that
12 they are Norfolk voters then they have the
13 burden of requiring that they be submitted to
14 some further test to determine whether or not
15 they are in fact voters registered in the City
16 of Norfolk. I think what the Charter is trying
17 to do is to simplify the proposal so that it
18 might be done expeditiously. The Charter sets up
19 a formula as for a first determination. As one
20 of the formulas the Charter has set is no longer
21 of this instance and obviously not the law of
22 the City or State.
23 THE COURT: I would ask you again, what is
24 the clerk suppose to do for a substitute if there
25 is no longer valid law as the Charter recites?

1 MR. COPELAND: I think he is entitled
2 to ignore --
3 THE COURT: He has to, sir. We don't have
4 it anymore. But where does he go from there?
5 MR. COPELAND: I think he presumes that
6 they are registered voters.
7 THE COURT: All right, sir.
8 MR. COPELAND: Because they say they are.
9 I would point out at the bottom of each petition
10 there is an affidavit saying that they are
11 registered voters.
12 THE COURT: Wouldn't that also always be
13 existing in the form a petition signed by people?
14 That they always certify they are registered
15 voters.
16 MR. COPELAND: Yes, they do. I'm saying
17 it's on the petition.
18 THE COURT: But that was always there when
19 people signed a petition and at the time we had
20 a pole tax still had to verify on pole tax books
21 to make sure the people said he was or she was
22 that they were in fact registered voters.
23 MR. COPELAND: I would suggest to the Court
24 this. That when someone comes forward and
25 challenges the technical --

1 THE COURT: The City has come forward now
2 and challenged it. They have challenged.
3 MR. COPELAND: And I think at that point
4 it would be proper and within the power of the
5 Court to --
6 THE COURT: I'm only raising this because
7 it is being challenged, the very fact of the --
8 the very manner in which the petition has come
9 forward is being challenged by the City.
10 MR. COPELAND: Yes, sir. And I think at
11 this point it would be proper in the judicial
12 responsibility to submit it, an independent
13 authority, namely the electoral board to verify
14 whether these are sufficient.
15 THE COURT: You're suggesting it's my
16 obligation, the Court's obligation that I call
17 in the clerk and say, "Here, Mr. Stovall, I want
18 to get this verified."
19 MR. COPELAND: Judge, --
20 THE COURT: I'm not an advocate. I'm only
21 hearing two sides. I'm suppose to be impartial.
22 I don't advocate anything.
23 MR. COPELAND: They are here in the Court,
24 they have been filed; therefore, they are no longer
25 in the hands of the petitioners.

1 THE COURT: Here, I'll give them to you.
2 You filed it.
3 MR. COPELAND: Yes, sir. But I don't think
4 we, at this point, can offer to the clerk and say,
5 "Please have these verified." I think now this
6 issue's been raised the Court can determine
7 whether or not some third party who is not
8 mentioned in the Charter should determine the
9 authenticity of the petitioners.
10 THE COURT: Mr. Copeland, you're asking
11 me to do somebody elses' work and I'm not going
12 to say whose work you're asking me to do. I'm
13 not going to do it. All right, sir.
14 MR. COPELAND: I would point out also while
15 it is not the law of Virginia, just as an example
16 of the procedure in another state which parallels
17 this, the Constitution of the State of California
18 in dealing with initiative, says that when these
19 petitions are filed with the proper official it
20 shall be presumed that the petition presented
21 contains the signatures of the requisite number
22 of qualified electors. And I really think that's
23 what our Charter intended.
24 THE COURT: Do you have any Virginia case
25 law outside of what the Constitution of California

1 says because I don't have anything to do with that.
2 MR. COPELAND: Yes, sir.
3 THE COURT: They can have anything they
4 want and the constitution is perfectly all right
5 out there. Do you have anything in Virginia case
6 law that would bear out the interpretation you're
7 placing on this particular section that you'd
8 want the Court to go along with you on?
9 MR. COPELAND: Judge, as you know, this
10 Charter has never been construed in this procedure.
11 There has only been one case in the history of
12 Virginia on any city charter provision for
13 initiative. I know of no cases other than
14 Whitehead and therefore this kind of technical
15 matter has not been addressed by the State and
16 I don't know if it's been addressed in another
17 kind of election contention. I certainly have
18 not researched that point, but it seems to me that
19 the pole tax is simply dead letter and falls
20 by the wayside and that procedure is simply
21 not followed. I just can't conceive that the
22 clerk of the court who is a constitutional officer
23 and himself elected by the people can just
24 refuse a whole lot of names and merely because
25 he was certifying they are genuine that automatically

1 that carries a certification that they are also
2 qualified voters in the city in order to go
3 from there to make a determination of something
4 else.
5 THE COURT: If that were to be the case
6 anybody could certify genuineness. As a matter
7 of fact, a person who has certified, or the notary
8 who has certified is certifying genuineness.
9 MR. COPELAND: And I think documents are
10 accepted in that contention.
11 THE COURT: But we are also talking about
12 voters. Somebody sixteen years old signs
13 it, the signature is genuine, but the sixteen
14 year old is not a qualified voter.
15 MR. COPELAND: Section forty-three deals
16 with the form and if anyone questions
17 the authenticity of any of the signatures
18 I think it's their burden to prove where
19 anyone of them is wrong. Where anyone of
20 them is sixteen or lives in Virginia Beach
21 or simply isn't registered to vote. And
22 I think that's the clerk's responsibility
23 as to look at them as to form.
24 THE COURT: Suppose he hasn't carried out
25 the responsibility? We're right back to where we

1 started. Now, suppose he has failed to do
2 this by virtue of the fact he has received,
3 according to your petition, he has certified in
4 accordance with section forty-four of the City
5 Charter and he cannot certify in accordance with
6 section forty-four of the City Charter because
7 one of the guts is that we don't have a pole
8 tax so on its face it certified as far as the
9 City is concerned. That is the point they're
10 making. Right on its face there certification
11 is based --
12 MR. COPELAND: Judge, they have an evidentiary
13 problem and I think it's then it's a lawsuit
14 over a factual matter.
15 THE COURT: All right, sir. Just pointing
16 it out to you for what it's worth. All right, sir.
17 Let's move on.
18 MR. COPELAND: As to the issue of the title
19 of the ordinance. On each of the petitions are
20 filed with the Court that was signed by the
21 voters there is an ample statement of what the
22 ordinance is and what it intends to do. That
23 appears on the face. Mr. Trapini stated that
24 it was required that the ordinance, proposed
25 ordinance, be on the reverse side of any petition

1 and I find no provision in law that states that.
2 I think it should be attached in some manner
3 and it was. It was presented on the reverse
4 side and on the front side was an explanation of
5 the nature of the ordinance that was proposed.
6 The Court might see, it's not a controlling
7 consideration but the Court could see that the
8 ordinance on the reverse side filled up every
9 inch of the paper and the front side explained
10 the nature of the ordinance that was proposed
11 and I submit that that's an adequate title.
12 Again this problem is not arisen in Virginia law
13 but in the state organization when this type of
14 thing arose they simply have hearings on whether
15 the title is sufficient and before it goes to
16 the voters the Court decided whether or not there
17 ought to be a revision of the title. There is
18 a highly technical matter and we submit another
19 more formal provision which we contemplated doing
20 prior to the publishing which was required in
21 this legislative process.
22 It is in our memorandum and we ask the Court
23 to consider it when we get to the formal stage of
24 publishing notice of the election as required
25 by the City Charter.

1 THE COURT: I agree with that form, should
2 not override substance, but can there be a
3 substitution of what you handed around to
4 petitioners against what you want to --
5 MR. COPELAND: Your Honor, I'm satisfied
6 with what we've handed fully discloses the
7 nature of the ordinance but I'm saying that to
8 conform to the manner in which the City passes
9 legislation, yes, I think it can be done. It
10 simply requires that a title be informed -- be
11 discolsed to the proper. There's nothing in
12 conflict between the formal title and the
13 simpler one that we are handing to the petitioners
14 themselves. It would have been physically im-
15 possible to do and to deal with pages and pages
16 of material in circulating a petition, I don't
17 believe.
18 I want to finally speak to an issue that
19 has been raised in the memorandum previously
20 filed. That has to do with who's going to set
21 the tax rate of the City of Norfolk. I've recited
22 in State law that the tax rate is a matter
23 that's addressed by Title 58, two sections of it
24 make it possible to change it at anytime. It
25 stands alone and apart from the budget process

1 that is defective or a fraud or they are asking
2 for this relief. They simply want to sumbit
3 a simple issue of taxation. The most important
4 thing the government does in regard to their
5 lives. We want to submit one time in the history
6 of Norfolk this issue for the people to decide
7 and I believe that's the whole thrust of
8 democracy in our country and in our state.
9 THE COURT: Mr. Copeland, as our City
10 Charter provides for the organization of government
11 and powers of city --
12 MR. COPELAND: Yes, sir.
13 THE COURT: -- whom do they place that on?
14 The organization of government and power.
15 MR. COPELAND: Not council.
16 THE COURT: All right, sir.
17 MR. COPELAND: The Charter in another section
18 provides, their judgment may be supplimented.
19 THE COURT: In certain matters, not in all
20 matters.
21 MR. COPELAND: That's my judicial interpretation
22 I think that's correct.
23 THE COURT: Now, let me ask you this
24 further, sir. Suppose through this thrust,
25 suppose the people who are dissatisfied, the people

1 on the petition who want to come to the City as
2 a whole to have taxes reduced, suppose they want
3 to have an initiative resolved there be no tax.
4 For the year 1980 in the City of Norfolk. Would
5 you say this is proper also for an initiative?
6 MR. COPELAND: Judge, that's a supreme
7 question I haven't considered.
8 THE COURT: It's a logical conclusion.
9 MR. COPELAND: I think that it is beyond
10 the scope --
11 THE COURT: Then where do we arrive at
12 what's the right thing for an initiative as far
13 as the figure. What's magic about a dollar
14 fifteen or eighty-five cents or about zero?
15 MR. COPELAND: Your Honor, the answer, I'm
16 sorry I'm a little slow on that, but the constitution
17 provides that all property in the Commonwealth
18 of Virginia shall be appraised and taxed.
19 THE COURT: Suppose we go down to a nickel?
20 MR. COPELAND: Judge, you're talking about
21 a particular source of revenue. If we set a
22 rate, but fairly assess the real estate of the
23 City of Norfolk and we set a rate of one cent,
24 I think it would be a proper legislative function
25 and it's --

1 THE COURT: Who is the "we" you're talking
2 about. If you say "we" set a dollar. Are you
3 talking about the people or are you talking about
4 the council?
5 MR. COPELAND: Talking about the people.
6 THE COURT: If the people came through and
7 said, let's set the real estate tax at five cent,
8 are we suppose to have an election on it?
9 MR. COPELAND: Judge, while that's a
10 supreme proposition I believe that on a
11 theoretical basis it would be proper.
12 THE COURT: Are we suppose -- let's assume
13 that it passes and let's assume as a result of
14 its passage there just isn't money in the kitty
15 to pay salaries, to pay garbage collectors, forget
16 judges because I'm not on the City payroll. At
17 one time we were, but let's forget the judges and
18 get the garbage collectors. Suppose we have that.
19 We don't have salaries for teachers, Don't have
20 salaries to pay attorneys of this -- as a result
21 of this election if there was one. Be rather
22 chaotic.
23 MR. COPELAND: Judge, this is a legislative --
24 I think it's a hypothetical question and it is
25 proper to submit it to whoever has the legislative

1 power. Now, the reason that neither the council
2 nor these people would do that is they want
3 police protection, they want fire protection
4 and they want education. They want a number of
5 services and the people have requested, we don't
6 need to get into the why in the Court. But
7 they have requested the budget process and have
8 been told it is necessary to have a dollar sixty-
9 two or a dollar thirty-five and they have
10 arrived at a compromising figure which they think
11 will be sufficient enough, which will provide
12 the services they want. Now, that's a
13 discretionary function and this group has
14 exercised it's discretion and wants the population
15 in general to exercise their discretion.
16 THE COURT: All right, sir. Let me take
17 you back to 204 Virginia which is the Whitehead
18 case. I'm quoting at page 151. Third paragraph
19 or the second paragraph. It must be assumed
20 that the General Assembly was familiar with the
21 general rule that initiative and a referendum
22 provision applies only to acts which are legislative
23 and not of an administrative general charter.
24 We do not think that it meant to provide a
25 measure whereby local governments would be

O R D E R

Numerous issues have been raised by counsel in their motions to vacate the Order of Election entered ex parte by the court on March 27, 1979, and pursuant to § 32 of the Norfolk City Charter.

The Court is of the opinion that the motions to vacate the order are well grounded (see pleadings and memoranda filed).

THEREFORE, it is ADJUDGED, ORDERED and DECREED that the Order of Election entered on March 27, 1979, be and hereby is vacated and the petition for elections filed on March 26, 1979, is denied and dismissed.

ENTER: May 4, 1979

Morris B. Gutterman, Judge

A COPY, TESTE: HUGH L. STOVALL, CLERK
BY: D. [illegible], D.C.

NOTICE OF APPEAL

TO: Honorable Hugh L. Stovall
Clerk, Circuit Court
Courts Building, 100 St. Paul's Blvd.
Norfolk, VA 23510

NOTICE is hereby given that the Committee of Petitioners, herein, the Petitioner in the above-styled case, appeals the judgment of the Court of May 4, 1979, in which the Court vacated its prior Order of Election entered on March 27, 1979, and denied and dismissed the Petition for Election.

No evidence having been taken in this case, no transcript or written statement of evidence will be submitted in the appeal of this case. The record consists of those papers specified in Rule 5:8 of the Rules of the Supreme Court of Virginia, including the pleadings, memoranda of law filed by the parties, and the original petitions of electors of the City of Norfolk which were filed with the Clerk upon the filing of the Petition for Election by the Committee of Petitioners.

Respectfully submitted,

COMMITTEE OF PETITIONERS

By: Howard E. Copeland
Of Counsel

Howard E. Copeland, Esq.
Montagna & Copeland
Suite Two, Witchduck Station
5291 Greenwich Road
Virginia Beach, VA 23462

I hereby certify that on this 8th day of May, 1979, I hand-delivered a true and accurate copy of this Notice of Appeal to Lawrence C. Lawless, Esquire, and Philip R. Trapani, Esquire, Counsel of record.

Howard E. Copeland

O R D E R

On the 21st day of May, 1979, came the City of Norfolk, by counsel, and moved this Court, pursuant to Rule 5:9 of the Rules of the Supreme Court of Virginia, for entry of an Order directing that the transcript of the hearing held before this Court on April 26, 1979 in the above matter become a part of the record on appeal of said matter from this Court, due notice of said motion having been given to counsel of the parties in interest.

UPON CONSIDERATION WHEREOF, and for good cause shown, it is

ORDERED that the transcript of said hearing be and hereby is made part of the record in this matter on appeal of same from this Court, such transcript to be filed in the office of the Clerk within sixty days after entry of the Court's Order of May 4, 1979, vacating its Order of Election of March 27, 1979.

ENTER: 5/21/79

Judge

Morris B. Gutterman, Judge

A COPY, TESTE: HUGH L. STOVALL, CLERK

BY , D. C.

FRANK TINUZZO
DEPUTY

Seen:

Harold P. Jones
Of counsel for City of Norfolk

Of counsel for Norfolk Electoral Board

Seen and objected to:

Of counsel for Committee of Petitioners

ASSIGNMENTS OF ERROR

I. THE COURT ERRED IN DENYING THE PEOPLE OF NORFOLK THE RIGHT TO INITIATE AN ORDINANCE SETTING THE REAL ESTATE TAX RATE FOR THE CITY.

II. THE COURT ERRED IN ADOPTING THE CITY'S POSITION THAT THE NORFOLK CITY CHARTER WAS SUPERSEDED AND REPEALED BY STATE LAW.

III. THE COURT ERRED IN SUSTAINING THE ARGUMENT THAT THE TIMING OF AN INITIATIVE ELCTION IS GOVERNED BY GENERAL STATE LAW, RATHER THAN CITY CHARTER.

IV. THE COURT ERRED IN FAILING TO TAKE EVIDENCE IF IT DOUBTED THAT PETITIONS WERE PROPERLY CERTIFIED.

V. THE COURT ERRED IN SUSTAINING THE ALLEGATION THAT THE PROPOSED ORDINANCE LACKED A TITLE.