



OFFICE OF THE COUNTY ATTORNEY

Douglas M. Duncan  
County Executive

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**MEMORANDUM**

January 26, 1998

TO: Kenneth E. Clark, Chair  
Charter Review Commission

VIA: Charles W. Thompson, Jr., County Attorney

FROM: Marc P. Hansen, Chief  
Division of General Counsel

RE: Proposed Charter Amendment to §305 - Compulsory Referendum; Revised

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The Board of Supervisors of Elections has notified the County Government, by letter dated November 25, 1997, that a petition to amend Charter §305 contains the requisite 10,000 signatures necessary to place the matter on the 1998 general election ballot ("Ficker Amendment").<sup>1</sup> The Ficker Amendment would require any tax increase to be approved by the voters in a referendum.

The Charter Review Commission has asked this office for a legal analysis of the Ficker Amendment.

**SHORT ANSWER**

Because the petition used to place the Ficker Amendment on the ballot was fundamentally misleading, the validity of the proposed amendment (even if adopted by the voters) will be questionable. Moreover, the Ficker Amendment itself contains significant ambiguities. Finally, since the Ficker Amendment will have no legal effect on the County Council's present authority to impose tax increases, a court would, if asked, prohibit submitting the amendment to the voters.

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<sup>1</sup>The petition drive to place this proposed charter amendment on the ballot was led by Robin Ficker. See *Washington Post* 10/14/97 and *The Baltimore Sun* 10/14/97, p. 2B.

### FICKER AMENDMENT - A DESCRIPTION

The Ficker Amendment provides in general that:

- (1) The County Council must refer any ordinance or resolution levying a tax that exceeds the "amount levied in the preceding fiscal year" to a referendum at the next general election;
- (2) Each ordinance or resolution imposing a tax increase must contain an alternate levy in the "amount of any tax levied in the preceding fiscal year." This alternate tax levy is effective on the date provided in the resolution or ordinance approving it.
- (3) The tax increase is effective only if approved by the voters at the next general election for members of the House of Representatives, and is effective immediately upon approval by the voters;
- (4) The County Council and the County Executive must inform the public of:
  - (a) The County's intent to levy a tax increase;
  - (b) The purpose of the tax increase; and
  - (c) The impact of the proposed increase on taxpayers.

The actual language of the proposed amendment which is to be added after the second paragraph of Charter §305 reads:

#### Approval of New or Additional Taxes by Referendum.

- (a) Notwithstanding the provisions above, the County Council shall refer to a referendum of the qualified voters of the County, at the ensuing regular general election for members of the House of Representatives of the United States, any ordinance or resolution levying any tax in excess of the amount levied in the preceding fiscal year. Each such ordinance or resolution [sic] shall be subject or [sic.] a separate ballot question at the referendum. Any ordinance or resolution adopted by the County Council levying any tax which is required to be referred to referendum as provided in this Section shall contain a separate levy in an amount equal to the amount of any tax levied in the preceding fiscal year. Such separate levy shall be effective on the date provided in the ordinance or resolution approving it. Any increase in the amount

of any tax over and above the amount levied in the preceding fiscal year shall be of no force or effect unless approved by a simple majority of voters voting on the ballot question at the referendum. Upon the approval of such ordinance or resolution [sic] by a simple majority of voters voting on the ballot question at the referendum, such ordinance or resolution shall take effect immediately.

- (b) The County Executive and the County Council shall inform the general public through public hearings, government media and public print and telecommunication media the the [sic] County's intention to levy a tax in excess of the amount levied in the preceding fiscal year, its projected fiscal impact upon taxpayers, and its intended purpose. The County Executive shall budget, and the County Council shall appropriate, the revenue to permit such information to be provided to the general public in the manner prescribed herein.
- (c) The language of the ballot question at the referendum describing any ordinance or resolution pursuant to this Section shall contain, but not be confined to:
  - (1) A description, in easy-to-understand language, or [sic] the kind or classification of the tax proposed to be levied;
  - (2) The amount of such tax during the preceding fiscal year;
  - (3) The amount of any proposed increase; and
  - (4) The purpose for which such additional tax is being levied.<sup>2</sup>

#### **FICKER AMENDMENT - INTERPRETATIVE PROBLEMS**

The Ficker Amendment begins with the phrase "notwithstanding the provisions above," even though the preceding two paragraphs of §305 do not address the imposition of taxes. Following the language of the proposed charter amendment, however, are two existing paragraphs of §305, including a charter provision adopted in 1990 and known as the Fairness in

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<sup>2</sup>A copy of the petition and proposed amendment are attached.

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Taxation ("FIT") Amendment.<sup>3</sup> The FIT Amendment imposes a requirement that 7 Council members approve the imposition of a property tax rate that produces more revenue than the property tax produced in the preceding fiscal year after making adjustments for inflation and new growth.

The initial question is whether the Ficker Amendment subjects a property tax increase approved under the FIT Amendment process to the referendum requirement as well.

We begin our analysis of this question by noting that a charter is to be read and construed like a statute. *Prince George's County v. Surratt*, 80 Md. App. 415, 422, 564 A.2d 95 (1989). In construing a statute, a court must strive to give effect to the purpose and policy of the act being construed. *Kaczorowski v. City of Baltimore*, 309 Md. 505, 513, 525 A.2d 628 (1987). Of course, a fundamental aid in construing a statute is the language used in the statute itself. *Id.* at 513. The Ficker Amendment tells us that it supersedes all that precedes it in §305. This implies that the Ficker Amendment did not intend to graft the referendum process onto the super majority requirement of the FIT Amendment. This conclusion is bolstered by the well-recognized rule of statutory construction that a specific provision prevails over a more general provision. *Prince George's County v. Surratt*, 80 Md. App. at 422. As already noted, the drafter of the Ficker Amendment may have used an outdated charter in which the second (and last) paragraph of §305 addressed tax levies and included the FIT Amendment. In that event, one might conclude that the purpose of the amendment was to graft a second approval process on top of the FIT Amendment process. In light of the primary rule of statutory construction that a law should be construed to give effect to its purpose, we believe a court would probably construe the Ficker Amendment to require a property tax increase approved by 7 members of the Council under the FIT process also to be approved by the voters.

The Ficker Amendment contains another interpretative difficulty. The requirement to submit a tax increase to referendum is based on whether the Council levies "any tax in excess of the amount levied in the preceding fiscal year." The interpretive difficulty arises because the Council levies a tax rate; the Council does not levy a tax amount. A tax amount is a product of a tax rate multiplied against some other unit (*e.g.*, assessed value, income, dwelling units, *etc.*) In short, the amount of the tax collected by the government can only be estimated when the tax is imposed. Thus, the Council might increase a tax rate but expect to collect less tax revenue than in the preceding tax year. In that event it is unclear if the Ficker Amendment would require a referendum. Despite its wording, the Ficker Amendment probably envisions that a referendum is required if the Council increases a tax rate. We believe a court would construe the Ficker Amendment to impose the compulsory referendum requirement on any increase in a tax rate,

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<sup>3</sup>It seems probable that the drafter of the Ficker Amendment petition used an out of date charter. The 1992 charter contained only two paragraphs. The last paragraph of the 1992 charter addressed tax levies and included the FIT Amendment.

because an increase in a tax rate is the most likely intended meaning of a "tax in excess of the amount levied in the preceding fiscal year". See *Swarthmore Company v. Kaestner*, 258 Md. 517, 266 A.2d 341 (1970) (a court should construe a statute so that it will be valid and avoid an unreasonable result). *Kaczorowski v. City of Baltimore*, 309 Md. at 513 (a court must strive to give effect to the purpose and policy of the act being construed).

### LEGAL SUFFICIENCY OF THE FICKER PETITION

MD. ANN. CODE art. 33, §23-3(a), provides that the State Administrative Board of Election Laws must prescribe the form for petitions, like the Ficker petition, which are filed under Article XI-A of the Maryland Constitution. The Information Guide for Montgomery County Charter Amendments (Rev. November 1996), issued by the Montgomery County Board of Supervisors of Elections, requires that a petition to amend the County Charter must state on the reverse of the petition the subject matter of the proposed amendment. Section 16-11, Montgomery County Code (1994), requires that the complete text of the proposed charter amendment must be set out in the petition.

In an apparent attempt to satisfy both the Board's requirements and §16-11, Ficker included on the face of the petition a statement indicating the purpose of the amendment. The actual text of the amendment apparently was appended to the petition. The statement indicating the purpose of the amendment states,

It is the intent of this amendment to require that the County Council, when increasing the amount of **any tax** over the preceding fiscal year, to first submit such tax increase for voter approval. **No tax increase** could go into effect without approval of a majority of the voters in the ensuing regular general election. [emphasis added]

A petition to amend the Charter should be worded so as to apprise the signer of the petition of the true nature of what is being proposed. *Board of Supervisors of Elections of Anne Arundel County v. Smallwood*, 327 Md. 220, 608 A.2d 1222 (1992) (Chasanow, J., dissenting, *dicta*). See *City of Takoma Park v. Citizens for Decent Government*, 301 Md. 439, 483 A.2d 348 (1984) (petition to subject County law to referendum invalid because it failed to inform voters what portions of the law the petition sponsors proposed to repeal); *Surratt v. Prince George's County*, 320 Md. 439, 578 A.2d 745 (1990) (ballot question regarding charter amendment invalid because question was misleading and failed to inform voters of true impact of amendment); *Anne Arundel County v. McDonough*, 277 Md. 271, 354 A.2d 788 (1976) (ballot question regarding referendum of zoning ordinance invalid because the question was misleading and failed to apprise voters of true nature of zoning ordinance upon which voters asked to render decision).

In our view, the Ficker petition is misleading because it tells a petition signer that **every** tax increase will be subjected to a compulsory-referendum process. As will be discussed below, the Ficker Amendment will not apply to property tax increases, and, in fact, will not impact on any present authority of the County to increase taxes.

The question then arises whether a misleading petition is a procedural flaw that must be challenged before the November election or if the petition's flaw affects the validity of the charter amendment even if approved by the voters.

Generally, if legal action challenging a procedural error regarding the adoption of a charter amendment is filed after an election is held, the court will not interfere with the full and fair expression of the will of the voters by invalidating an amendment receiving majority support at the polls. Prior to an election, however, the courts will require full compliance with all procedural requirements for placing a question on the ballot. *Anne Arundel County v. McDonough*, 277 Md. 271. In *McDonough*, the Court of Appeals explained that a legal action challenging procedural errors must be filed prior to an election. A court's decision, however, need not necessarily be rendered prior to the election. The Court noted that statutes giving direction as to the manner of conducting an election are generally considered as directory when addressed after an election, **unless** the deviation from required procedures had a **vital** influence upon the election. *Id.* at 801.

In our opinion, a misleading petition that leaves a reasonable person in doubt as to its effect is fundamentally flawed and cannot help but have a vital influence on the election.<sup>4</sup> If a petition is misleading, it is impossible to determine that the ballot petition has received the necessary approval of 10,000 voters, as required by Article XI-A, §5, of the Maryland Constitution. Perhaps if the petition signers had been informed that the Ficker Amendment did not apply to property tax increases--or any tax increase for that matter, Ficker would not have been able to obtain the necessary 10,000 signatures.<sup>5</sup>

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<sup>4</sup>If the Ficker Amendment were approved by the voters, a challenge to the petition process would need to be brought promptly to avoid a defense of laches. *See Schaeffer v. Anne Arundel County*, 338 Md. 75, 656 A.2d 751 (1995) (Court applies laches to bar a challenge to a county ordinance on the grounds of a procedural flaw in its enactment. The action was brought more than 3 years after public notice was given of the enactment of the ordinance.)

<sup>5</sup>As later discussed, we conclude that the Ficker Amendment will have no impact on the County's authority to impose any tax increases. This leads to a further legal problem. If a proposed charter amendment can have no effect, the question is invalid. Under Maryland law, a ballot question cannot be proposed merely to measure public sentiment on a matter. Straw votes are not permitted. *Montgomery County v. Board of Elections*, 311 Md. 512, 536 A.2d 641

## THE APPLICABLE LAW

The central issue concerning the legal validity of the Ficker Amendment rests on whether a charter can subject the Council's decision to increase a tax rate to a compulsory-referendum process. For the reasons explained below, we conclude:

- (1) If the County's power to impose a tax derives from a public general law, the exercise of that authority cannot be subjected to a referendum.
- (2) If the County's authority to impose a tax derives from its home-rule powers under Article XI-A of the Maryland Constitution and the Express Powers Act (MD. ANN. CODE art. 25A), that authority cannot be subjected to compulsory referendum.
- (3) If the County's authority to impose a tax derives from a public local law that authorizes the Council to impose a tax (as opposed to the corporate entity of the County), the Council's action cannot be subjected to a referendum.
- (4) If the County's authority to impose a tax derives from a public local law granting taxing authority to the County as a corporate entity, the taxing authority may be subjected to compulsory referendum.

Before beginning a more detailed legal discussion, it would be helpful to discuss what is meant by the terms "public general law", "public local law", and "referendum". A public general law "deals with the general public welfare, a subject which is of significant interest not just to any county, but rather to more than one geographical subdivision, or even to the entire state." *Steimel v. Board*, 278 Md. 1, 5, 357 A.2d 386 (1976). A public local law, on the other hand, is a law that in its "subject matter and substance...[is] confined in its operation to prescribed territorial limits...." *Id.* Referendum generally refers to the power of voters directly to adopt or reject legislation passed by the legislature. In *Ritchmount Partnership v. Board*, 283 Md. at 60, 388 A.2d 523 (1978) the Court of Appeals noted,

It is customary to draw a distinction between compulsory referenda on the one hand and optional or 'facultative' referenda on the other. Where the legislature directs that a given statute not take effect until and unless approved by a vote of the electorate, it is described as 'compulsory' [citations omitted]. Where, however, the people are authorized, usually

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<sup>5</sup>(...continued)  
(1986).

by constitutional reservation, to require submission of a bill for their approval by petition, even though the Legislature is silent on the matter of a plebescite, the voters are said to possess the power of facultative referendum. *Id.* at 60.

For purposes of this memorandum we have characterized the Ficker Amendment referendum process as compulsory.

#### I. Referendum--Public General Law and Home Rule Powers

The operation of a public general law may not be conditioned on the approval of the voters at a referendum on either a state-wide or county-wide level. The reason for this prohibition is that the Maryland Constitution has vested law-making authority in the General Assembly and that authority cannot be transferred to the voters. *Board of Public Works v. Baltimore County*, 288 Md. 678, 421 A.2d 588 (1980) (General Assembly cannot delegate to voters of Baltimore County authority to approve expenditure of State funds to construct a performing arts center.). A public local law enacted by the General Assembly, however, may be subjected to a referendum. *Ness v. Baltimore*, 162 Md. 529 (1932).

The Court of Appeals has held that a charter may require a county council to share its legislative home-rule powers granted under Article XI-A of the Maryland Constitution and the Express Powers Act with the voters through an optional referendum process. *Ritchmount Partnership v. Board*, 283 Md. 48. In *Ritchmount*, the Court of Appeals upheld an Anne Arundel County charter amendment that provided for optional referendum (upon petition by the voters) of acts adopted by the County Council. The Court concluded that a charter provision granting voters the power of optional referendum was consistent with the provision in Article XI-A of the State Constitution that provides for an elected county council "in which shall be vested the law-making power of [the] County." The Court of Appeals concluded that Article XI-A "undoubtedly requires that the Council be the **primary** legislative organ; it does not altogether preclude the existence of other entities with coordinate legislative powers." [emphasis added] *Id.* at 63.

In *Board v. Smallwood*, 327 Md. 220, 608 A.2d 1222 (1992), the Court of Appeals addressed the legality of proposed amendments to the Anne Arundel County and Baltimore County charters. Both amendments proposed to impose a cap on the amount the Council could increase the property tax rate. Each amendment contained a roll-back provision limiting the amount of tax revenues for the 1991-92 tax years to a previous year and each provided for an escape clause. The Court concluded:

In addition, each county's proposed amendment included an escape clause that would have allowed the county councils to increase the property tax rates in any



given tax year above the rate specified in the tax cap by referring the proposed increase to the voters for approval. The escape clause provisions were invalid for the same reason that the roll-back provisions were invalid. Section 6-302(a) of the Tax-Property Article requires that a county's tax rate be set by the governing body of the county. The effect of the escape clause provisions would have been that, even if a county council would determine in any given year that it is necessary to raise the tax rate above the limit specified by the cap, the voters of the county would have decided whether the rate would be raised to particular levels above the caps or would remain at cap levels. Thus, in essence, the voters would be setting the tax rate for that year.

In light of our conclusion that the escape clause provisions violated public general law, we need not deal with other issues that were raised concerning the validity of the escape clauses. *Id.* at 244-45.

Combining the teachings of *Board of Public Works v. Baltimore County*, *Ritchmount*, and *Smallwood*, we are left with the conclusions that:

- (1) Implementation of a tax authorized by a public general law cannot be conditioned by compulsory or optional referendum, because to do so would amount to an unconstitutional delegation of legislative authority to the voters; and
- (2) Implementation of a tax authorized under a charter county's home rule powers cannot be subjected to compulsory referendum, because compulsory referendum deprives the council of its primary legislative function required under Article XI-A of the Maryland Constitution.

## II. Referendum--Public Local Law

In a March 11, 1997, letter of advice to Delegate Nathaniel Exum, Chair of the Prince George's County delegation, Assistant Attorney General Robert Zarnoch provided a thoughtful analysis of whether Prince George's County's decision to increase a school-facilities surcharge authorized by House Bill 938 must be mandated to referendum under §817C of the Prince George's County Charter. Charter §817C provides "the County Council shall refer to a referendum of the qualified voters of the County, at the ensuing regular general election for members of the House of Representatives of the United States, any ordinance or resolution levying or charging the amount of any tax or fee in excess of the amount levied or charged in the preceding fiscal year." Mr. Zarnoch noted that the effectiveness of a public local law, unlike a public general law, can be made subject to a referendum if it was the intention of the General Assembly to do so. Mr. Zarnoch reasoned, "In light of the fact that automatic local referendum of state-conferred revenue-raising authority is in derogation of the General Assembly's sovereign

powers, I think it more likely than not that a Maryland court would demand a clear expression of legislative intent--certainly one clearer than a mere reference to the County's power to act by ordinance--before it will find a charter provision like §817C to be applicable to an ordinance enacted pursuant to the authority of a public local law." Mr. Zarnoch concluded that ordinances passed under authority of House Bill 938 were not subject to §817C because there is no clear evidence of the General Assembly's intent to do so.

We differ somewhat from Mr. Zarnoch's reasoning. We believe that acts of the General Assembly enabling a charter county to undertake some action should be construed, absent an indication to the contrary, to permit the County to implement its authority in a manner consistent with its charter. However, when the General Assembly authorizes a **specific entity** in the county government to exercise a power, we believe the General Assembly expects that specific entity, like a council, to act unencumbered by charter requirements to share that power with other entities such as a county executive or the voters.

We have come to this conclusion for three reasons: First, two laws should be construed to give effect to both whenever possible. *See Loker v. State*, 2 Md. App. 1, 233 A.2d 342, *affirmed*, 250 Md. 677, 245 A.2d 814, *cert. denied*, 393 U.S. 1082 (1967) Second, the General Assembly is presumed to act with full knowledge as to prior and existing law. *See Mayor and City Council of Baltimore v. Hackley*, 300 Md. 277, 477 A.2d 1174 (1984). Accordingly, when the General Assembly authorizes the Montgomery County Executive or the Montgomery County Council to undertake some act, the General Assembly knows full well that the Montgomery County Charter provides for a governing body in which the legislative powers of the County are shared between a legislative and executive branch. Under these circumstances, we believe that when the General Assembly authorizes the County Council to exercise some authority, it intends that such authority be exercised without sharing that authority with the County Executive.<sup>6</sup> An example of this principle is the Regional District Act which vests the Council with sole authority to adopt zoning ordinances<sup>7</sup> despite Charter §208 which grants the County Executive veto authority over legislative acts of the Council. *See Hooper v. Creager*, 84 Md. 195 (1896) (State statute specifically gave Mayor of Baltimore a role in appointing city officers; this appointment power was not "given to the municipality as a mere corporate entity, to be exercised like other corporate powers in the usual and ordinary way." *Id.* at 242-44) Third, this construction is consistent with general law elsewhere in the country. McQuillin, *Municipal Corporations*, §16.53, notes:

It has been ruled that if the grant of power from the legislature is to the legislative authority of the city, the city council's actions in exercising the power by ordinance is not subject to referendum, but if the grant of

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<sup>6</sup>The reverse is of course also true.

<sup>7</sup>See MD. ANN. CODE art. 28, §8-104.

power is to the corporate entity of the city, the referendum may then be invoked.

For these reasons we conclude that if the General Assembly enacts a public local law authorizing a county council to impose a tax-- as distinguished from the county as a whole-- the council's taxing authority cannot be shared with the voters through the referendum process, unless the General Assembly clearly indicates that it should.

### IMPACT OF FICKER AMENDMENT ON COUNTY TAXING AUTHORITY

To apply the above discussed legal rules concerning the relationship between the Ficker Amendment's compulsory referendum process and the County's taxing authority requires us to identify the source of authority for each of the various taxes imposed by the County. The taxes imposed by the County and the application of these legal rules are discussed below:

1. **Property tax.** The County's general authority to impose a property tax derives from MD. CODE ANN., Tax-Prop. §6-302(a). The Tax- Property Article is a public general law and the Council's exercise of authority to impose a property tax therefore cannot be subjected to a referendum, because the Maryland Constitution prohibits the operation of a public general law to be conditioned on a referendum (compulsory or optional).<sup>8</sup> *Board of Public Works v. Baltimore County*, 288 Md. 678; *Board v. Smallwood*, 327 Md. 220.

The County utilizes its authority under §5(O) of the Express Powers Act to impose property taxes in tax districts.<sup>9</sup> These taxes, which derive from the County's home-rule powers, cannot be subject to compulsory referendum, because compulsory referendum robs the Council of its primary legislative role as required under Article

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<sup>8</sup>The Maryland-National Capital Park and Planning Commission property taxes are also authorized under a public general law. See MD. ANN. CODE art 28 §§ 2-118, 3-103, 6-106, 6-107, and 6-108. For the same reason, these property taxes cannot be subjected to any referendum process either.

<sup>9</sup>These property tax district taxes include the Parking Lot District Tax (Chapter 60, Montgomery County Code); the Washington Metropolitan Area Transit tax (§52-13, Montgomery County Code); the Urban District Tax (Chapter 68A, Montgomery County Code); the Noise Abatement District Tax (Chapter 68B, Montgomery County Code); the Fire District Tax (§21-4R, Montgomery County Code); and the Recreation District Tax (§41-5, Montgomery County Code).

XI-A of the Maryland Constitution. *Board vs. Smallwood*, 327 Md. 220; *Ritchmount v. Board*, 283 Md. 48.

There is another reason that the Ficker Amendment cannot apply to property tax increases of any magnitude.<sup>10</sup> The Ficker Amendment provides that a tax increase is not valid until approved by the voters at the next general election. If approved by the voters, the Ficker Amendment provides that the tax increase takes effect **immediately**. Section 6-302 of the Tax-Property Article, however, requires the County to set the property tax rate each year between January 1 and June 30 for the next tax year (July 1 through the following June 30). The effect of the Ficker Amendment is to set the tax rate in November, a clear conflict with the requirements of State law. This conflict leads to the presumably unintended result of preventing the Council from imposing any property tax increase whatsoever.<sup>11</sup> This conflict with state law leads us to conclude that a court would seek to construe the Ficker Amendment to exclude property tax increases. *See Pickett v. Prince George's County*, 191 Md. 648, 422 A.2d 449 (1991) (constructions which lead to illegal or absurd results should be avoided).

2. **County income tax.** MD. CODE ANN., Tax-Gen. §10-106 provides “Each county shall set, by ordinance or resolution, a county income tax equal to at least 20% but not more than 60%, to be applied to the state income tax for an individual, modified as provided under sub-section (d) of this section.” In our view, there is no doubt that §10-106 is a public general law and accordingly cannot be subject to a referendum.

In addition, we note that the Ficker Amendment conflicts with §10-106, because subsection (b) provides that the County must make any increase effective on January 1 of the year the County designates, and give the Comptroller notice of the change on or before July 1 prior to its effective date. The Ficker Amendment provides that the

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<sup>10</sup>Not every property tax rate increase triggers the 7-vote requirement imposed under the FIT Amendment. See above discussion on the applicability of the compulsory referendum process on the FIT Amendment.

<sup>11</sup>A provision of a county charter which conflicts with the public general law is invalid. *Montgomery County v. Board of Elections*, 311 Md. 512, 532 A.2d 641 (1988). A conflict exists if local law prohibits that which state law expressly permits or permits that which state law expressly prohibits. *Baltimore v. Sitnick*, 254 Md. 303, 255 A.2d 376 (1969); *Mayor & Council of Forest Heights v. Frank*, 191 Md. 331, 435 A.2d 425 (1981); *Rosecroft Trotting & Pacing Assoc. v. Prince George's County*, 298 Md. 580, 471 A.2d 719 (1984).

increase is effective in November. This conflict with State law would render the Ficker Amendment inapplicable to the County income tax.

3. **Real property transfer tax.** Since 1961 the General Assembly by public local law has authorized the Council to levy a tax on the transfer of real property in Montgomery County. *See* §52-20, Montgomery County Code (1994). Because this provision, which has been amended since the County instituted an executive form of government in 1968, specifically designates the Council (as opposed to the County government) as the entity with the authority to impose a real property transfer tax, we believe that the Ficker Amendment would not apply to that tax.
4. **Other excise taxes.**<sup>12</sup> 1963 Md. Laws Ch. 808 provides, “The County Council for Montgomery County is hereby empowered and authorized to have and exercise, within the limits of the County, in addition to any and all taxing powers heretofore granted by the General Assembly, the power to tax to the same extent as the State has or could exercise said power within the limit of the County as part of its general taxing power ....”<sup>13</sup> This provision has been amended by the General Assembly at various times since 1968 when the executive form of government was created in Montgomery County. Accordingly, we believe that the General Assembly, by consistently using the term “County Council” specifically intended to provide that entity with the exclusive authority to impose these excise taxes. On numerous occasions the Council has in fact exercised its authority to alter an excise tax rate independent of the Executive’s veto authority over legislation.<sup>14</sup>
5. **Admissions and amusement tax.** MD. CODE ANN., Tax-Gen. §4-102 provides that a county may impose by resolution a tax on the gross receipts

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<sup>12</sup>These excise taxes include the Room Rental and Transient Tax (§52-16, Montgomery County Code); the Telephone Tax (§52-15, Montgomery County Code); the Fuel-Energy Tax (§52-14, Montgomery County Code); the Development Impact Tax for Major Highways (§52-47 *et seq.*, Montgomery County Code); and the Expedited Development Approval Excise Tax (§52-60 *et seq.*, Montgomery County Code).

<sup>13</sup>Chapter 808 is codified at §52-17 of the Montgomery County Code (1994).

<sup>14</sup>In passing we note that the Ficker Amendment if applicable to these excise taxes would, as a practical matter, impose a significant delay in the effective date of a tax increase. This delay could pose practical and policy problems. For example, a proposed tax increase on new development could lead to a significant acceleration of development before the tax could take effect.

derived from any admissions and amusement charge in that county. Clearly, §4-102 is a public general law and cannot be subjected to a referendum process.

6. **Revenue tax on trailer-coach parks.** In 1961 the General Assembly authorized the County Council to levy a tax on the number of trailer spaces in use in Montgomery County. The tax cannot exceed \$6.00 per space. This authorization was made in 1961 Md. Laws Ch. 488, and is codified in §52-12 of the Montgomery County Code. Although not entirely free from doubt, because this section has not been amended since the County formed an executive form of government, we believe that it is unlikely that the General Assembly intended to authorize any other entity other than the Council to exercise this taxing authority. Furthermore, this tax has not been imposed since 1985 or 1986.

### CONCLUSION

In our view, the Ficker Amendment is flawed for numerous reasons. First, the petition on which the Ficker Amendment is founded was fundamentally misleading which therefore calls into question the validity of the Ficker Amendment even if it is approved by the voters in November 1998. Second, the Ficker Amendment contains significant ambiguities that could well lead to litigation over its applicability. Third, the Ficker Amendment will have no legal impact on the County's present authority to impose taxes. Indeed, in light of this last conclusion, the Ficker Amendment asks voters to engage in a straw vote, an undertaking that is not permitted under Maryland law. Therefore, we believe a court, if asked, would enjoin inclusion of the Ficker Amendment on the November ballot. *Montgomery County v. Board of Elections*, 311 Md. 512.

### EPILOGUE

Finally, we note that the County Council, which is obligated under MD ANN. CODE art. 33, §23-1 (a)(1), to certify ballot questions to the Board of Supervisors of Elections, will be placed in an extremely difficult--if not impossible-- position in attempting to draft a ballot question which fairly informs the public of the intended purpose of the Ficker Amendment and its actual legal consequences. *Surratt v. Prince George's County*, 320 Md. 439. The Council may wish to consider filing a declaratory judgment action in Circuit Court in order to resolve this problem.

We hope this opinion will be helpful to the Charter Review Commission in its deliberations on this important matter. If we can provide further information or clarification, please let us know.

Kenneth E. Clark, Chair/Charter Review Commission  
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c: Douglas M. Duncan, County Executive  
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Michael E. Faden, Senior Legislative Counsel  
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State of Maryland

To Amend the Charter of Montgomery County

TO: the President of the County Council of Montgomery County:

The undersigned registered voters of Montgomery County do hereby petition to have submitted to the registered voters of Montgomery County for approval or rejection at the next general election the amendment of the Charter of Montgomery County in accordance with the provisions of Article XI-A of the Md. Constitution.

It is the intent of this amendment to require that the County Council, when increasing the amount of any tax over the preceding fiscal year, to first submit such tax increase for voter approval. No tax increase could go into effect without approval of a majority of the voters in the ensuing regular general election.

(THE SUBJECT MATTER OF THIS PETITION IS PRINTED ON THE BACK)

Sign <u>Rita Holstein</u> Date <u>10/8/97</u>	Sign <u>[Signature]</u> Date <u>10-5-97</u>
Print <u>RITA HOLSTEIN</u> Date Birth	Print <u>Rebecca Charipko</u> Date <u>3-15-61</u> Birth
Home Address <u>5509 Potomac School Terr.</u>	Home Address <u>14721 Spring-Field Rd</u>
Town <u>Pot.</u> County <u>HD</u> Zip <u>20851</u>	Town <u>Darnestown</u> County <u>Mont.</u> Zip <u>20874</u>
Sign <u>Amy Smith</u> Date <u>10/8</u>	Sign <u>James F. Roby, Jr.</u> Date <u>10-9-97</u>
Print <u>Amy Smith</u> Date Birth <u>8/16/67</u>	Print <u>JAMES F. ROBY JR.</u> Date Birth <u>5-4-48</u>
Home Address <u>932 Willowleaf Way</u>	Home Address <u>13021 Mill House Ct.</u>
Town <u>MD</u> County <u>MD</u> Zip <u>20851</u>	Town <u>Germantown</u> County <u>Mont.</u> Zip <u>20874</u>
Sign <u>Grace Tung</u> Date <u>8/08</u>	Sign <u>Maria S. Frager</u> Date <u>10/9/97</u>
Print <u>Grace Tung</u> Date Birth <u>12/11/64</u>	Print <u>Maria S. Frager</u> Date Birth <u>9-10-58</u>
Home Address <u>13623 Valley Oak Circle</u>	Home Address <u>18824 Falling Star Rd</u>
Town <u>Coonville</u> County <u>Mont</u> Zip <u>20875</u>	Town <u>Stuart</u> County <u>MO</u> Zip <u>20874</u>
Sign <u>Debra R. Quinn</u> Date <u>10-8-97</u>	Sign <u>Elizabeth A. Fleming</u> Date <u>10/9/97</u>
Print <u>Debra R. Quinn</u> Date Birth	Print <u>ELIZABETH A. FLEMING</u> Date Birth <u>8-13-43</u>
Home Address <u>24056 Newbury Rd.</u>	Home Address <u>12854 JAGE TERRACE</u>
Town <u>Gaith.</u> County <u>Mont</u> Zip <u>20882</u>	Town <u>Germantown</u> County <u>Mont</u> Zip <u>20874</u>
Sign <u>Jay Lowell</u> Date <u>10-8-97</u>	Sign <u>W. Kerrick</u> Date <u>10-9-97</u>
Print <u>JAY LOWELL</u> Date Birth <u>10-15-57</u>	Print <u>W. Kerrick</u> Date Birth <u>5-15-55</u>
Home Address <u>17605 Goodie Circle</u>	Home Address <u>Crusader Ct</u>
Town <u>OLNEY</u> County <u>MONTGOM</u> Zip <u>20852</u>	Town <u>Germantown</u> County <u>Mont</u> Zip <u>20874</u>

AFFIDAVIT

I, JOHN WARNER (PRINT FULL NAME), UNDER PENALTY OF PERJURY, DO SOLEMNLY SWEAR (OR AFFIRM) TO THE BEST OF MY KNOWLEDGE AND BELIEF, THAT ON THIS PETITION THE SIGNATURES ARE GENUINE AND BONA FIDE, THE SIGNERS ARE REGISTERED VOTERS OF THE COUNTY OR CITY AS SET FORTH IN THE PETITION, AND THAT I PERSONALLY OBSERVED THE SIGNERS SIGN THE PETITION.

[Signature] 10/9/97  
Affiant's Signature Date

Address 8707 IVYBERRY WAY Tel: (301) 840-1637  
Town GAITHERSBURG Zip 20879

DO NOT WRITE IN SPACE BELOW

TOTAL NUMBER OF SIGNATURES \_\_\_\_\_

NUMBER INVALIDATED \_\_\_\_\_

TOTAL VALID SIGNATURES \_\_\_\_\_

ENDORSED BY \_\_\_\_\_



PROPOSED AMENDMENT

It is the intent of this amendment to require that the County Council, when increasing the amount of any tax over the preceding fiscal year, to first submit such tax increase for voter approval. No tax increase could go into effect without approval of a majority of the voters in the ensuing regular general election.

The following language shall be added after the second paragraph of Section 305 of the Charter, Approval of the Budget; Tax Levies:

Approval of New or Additional Taxes by Referendum.

(a) Notwithstanding the provisions above, the County Council shall refer to a referendum of the qualified voters of the County, at the ensuing regular general election for members of the House of Representatives of the United States, any ordinance or resolution levying any tax in excess of the amount levied in the preceding fiscal year. Each such ordinance or resolution shall be subject or a separate ballot question at the referendum. Any ordinance or resolution adopted by the County Council levying any tax which is required to be referred to referendum as provided in this Section shall contain a separate levy in an amount equal to the amount of any tax levied in the preceding fiscal year. Such separate levy shall be effective on the date provided in the ordinance or resolution approving it. Any increase in the amount of any tax over and above the amount levied in the preceding fiscal year shall be of no force or effect unless approved by a simple majority of voters voting on the ballot question at the referendum. Upon the approval of such ordinance or resolution by a simple majority of voters voting on the ballot question at the referendum, such ordinance or resolution shall take effect immediately.

(b) The County Executive and the County Council shall inform the general public through public hearings, government media and public print and telecommunication media the the County's intention to levy a tax in excess of the amount levied in the preceding fiscal year, its projected fiscal impact upon taxpayers, and its intended purpose. The County Executive shall budget, and the County Council shall appropriate, the revenue to permit such information to be provided to the general public in the manner prescribed herein.

(c) The language of the ballot question at the referendum describing any ordinance or resolution pursuant to this Section shall contain, but not be confined to:

- (1) A description, in easy to understand language, or the kind or classification of the tax proposed to be levied;
- (2) The amount of such tax during the preceding fiscal year;
- (3) The amount of any proposed increase; and
- (4) The purpose for which such additional tax is being levied.