

M E M O R A N D U M

September 3, 1992

TO: Susan Ness, Chair
Montgomery County Charter Review Commission

VIA: Joyce R. Stern *Joyce R. Stern*
County Attorney

FROM: Marc P. Hansen *Marc Hansen*
Senior Assistant County Attorney

RE: Proposed Charter Amendment to Require Council When
Increasing County Piggyback Income Tax Above 50% to
Decrease County Property Tax by an Equivalent Amount

The Board of Supervisors of Elections has notified County Executive Potter by letter dated August 6, 1992, that a petition initiated by Robin Ficker (Ficker) to amend Charter Section 305 contains the requisite 10,000 signatures necessary to place the matter on the 1992 general election ballot. A copy of the petition is attached. On August 4, 1992, the County Council certified to the Board of Supervisors of Elections the ballot title for the proposed amendment and designated it as Question A. A copy is attached.

The Charter Review Commission has asked if the amendment proposed by Ficker is legal.

BACKGROUND

In response to the fiscal crisis facing State and local governments, the General Assembly adopted 1992 Md. Laws Chapter 2 (1st Sp Sess). Chapter 2, among other revenue measures, authorizes each county to impose a county income tax equal to 60% of the State income tax for an individual.¹ Previously, the

¹Chapter 2 amends Md. Tax - Gen. Code Ann. Section 10-106 to accomplish this purpose.

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maximum piggyback tax rate that a County could² impose had been 50% of the State income tax for an individual.² The General Assembly granted this increased taxing authority to the counties to compensate for reduced State aid to local jurisdictions. See, 77 Opinions of the Attorney General _____ (1992) [Opinion No. 92-013 (May 8, 1992)].

On April 21, 1992, the Montgomery County Council introduced Resolution 12-647 which proposed to increase the County's piggyback tax from 50% of the State income tax for individuals to an effective rate of 55% for calendar year 1992 and a 60% rate for subsequent calendar years.³ After holding a public hearing on May 7, 1992, as required by Section 10-106(a)(3), the Council adopted Resolution 12-647 on May 11, 1992.

In response to the introduction of Resolution 12-647, Ficker initiated a petition drive described as an effort to keep the piggyback tax rate at 50% or require that the County cut property taxes by an amount equal to any amount raised by the imposition of a piggyback tax above a 50% rate. See, The Gazette, 5/27/92; Montgomery Journal, 4/29/92 and 6/16/92; and The Almanac, 6/17/92.

Ficker, in testifying before the Council at its public hearing on Resolution 12-647, stated that his proposed Charter amendment was "revenue neutral". He explained the amendment's effect as, "for every dollar you get in new piggyback tax revenue, you have to subtract that from property tax revenue." In an article appearing in the Washington Post on 6/30/92, Ficker is quoted as saying with regard to his proposed Charter

²The County income tax is often referred to as the piggyback tax.

³Under Md. Tax - Gen. Code Ann. Section 10-106(a)(2), the rate imposed by the Council continues until changed. Accordingly, the rate is not set on an annual basis like the real property tax rate. See, Md. Tax Prop. Code Ann. Section 6-302.

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amendment and the Council's approval of Resolution 12-647, "Go ahead and raise it [income tax], but you're not going to get any more revenue." See also the Montgomery Journal, 4/29/92.

The petition circulated by Ficker states, in part:

It is the intent of this amendment to require that the County Council, when increasing County piggyback income tax revenues above 50% of the State income tax, decrease County property tax revenues, as adjusted for inflation, by the equivalent amount. (Emphasis added.)

Following this statement of intent, the text of the proposed amendment to Charter Section 305 is set forth. The proposed amendment states:

Provided, however, that in any year that the County shall set by ordinance or resolution, a County income tax of more than 50% to be applied to the state income tax for an individual, the Council shall not levy an ad valorem tax on real property to finance the budgets that will produce total revenue that exceeds the total revenue produced by the tax on real property in the preceding fiscal year plus the Consumer Price Index increase percentage of the previous year's real property revenues, minus the county income tax revenue in excess of 50% to be applied to the state income tax for an individual.

This proposed amendment, however, does not result in a revenue neutral reduction of the property tax by an amount "equivalent" to the amount raised by the piggyback tax in excess of 50%.

The proposed Charter amendment establishes the following restriction on real property tax revenues which applies in any year the Council "shall set" the piggyback tax rate above 50%: Total real property tax revenue may not exceed: (1) revenue raised by the tax on real property for the preceding fiscal

year; (2) increased by the Consumer Price Index⁴ (CPI); (3) less the piggyback tax revenue in excess of 50%. Applying this formula does not lead to a revenue neutral reduction in the property tax that equals the revenue generated by the piggyback tax above 50%. In fact, according to the Office of Management and Budget (OMB) the loss realized in the first year to real property tax revenues exceeds the revenue generated from the piggyback tax by an estimated \$8.8 million. Over time, this difference becomes dramatically magnified.

The loss of real property revenue occurs, in part, because new construction is not allowed⁵ to generate additional tax revenue under the Ficker amendment.⁵ The following example

⁴The amendment petitioned to the ballot is not well drafted. One of the ambiguities created by the language used in the proposed Charter amendment is how the CPI is to be computed; i.e., on a calendar year basis, a fiscal year basis, or as expressly provided for elsewhere in Charter Section 305 on a November-to-November basis. Applying the language of the amendment literally, it appears that the proposed Charter amendment intends to have the CPI computed on a fiscal year basis. The fiscal year begins on July 1. See, Charter Section 301. The property tax is levied on the same fiscal year and the tax rate must be set prior to June 30. See, Charter Section 305. However, using the fiscal year to compute the CPI will require the County to use an estimate since the CPI for the preceding fiscal year will not be known until after the property tax rates are set. Another drafting problem is discussed below in Part C of the Legal Discussion.

⁵By way of contrast, in 1990 the voters approved an amendment to Charter Section 305 which provides: (a) unless approved by 7 councilmembers the real property tax may not exceed the previous year's real property tax revenues plus the CPI; and (b) the limit does not apply to (i) newly constructed property, (ii) newly rezoned property, (iii) property that, because of a change in State law, is assessed differently than it was assessed in the previous year, (iv) property that has undergone a change in use, and (v) any development district tax used to fund capital improvement projects.

illustrates this phenomenon: In year one, the assessable base contains 100 homes. The assessable base for the next tax year grows by 10 newly constructed homes.⁶ Under the Ficker amendment, no additional tax revenues may be collected from the 10 new homes because the formula demands that the same real property tax revenues, adjusted by inflation, must be collected in year two (110 homes) as were collected in year one (100 homes).

The Ficker amendment further diminishes County government's ability to carry out its responsibilities because to the extent that the piggyback tax collections exceed the CPI adjustment to the property tax, the real property tax base becomes further eroded. Over time, this erosion will seriously deplete the real property tax as a source of revenue. For example, if the property tax revenue in the base year is 100, the CPI is 10%, and the piggyback tax collections above 50% is 20, the starting point for determining the real property tax base in year one in which the Ficker amendment applies is 90; $(100+10-20=90)$; year two is 79 $(90+9-20=79)$; year three is 67, $(79+8-20=67)$, etc.⁸

Over time, the lost revenues from real property taxes compounds so that by FY 99, OMB estimates the difference between piggyback tax revenues generated by a rate in excess of 50% and

⁶Of course, each additional home will increase demands for additional services for education, fire and police protection, libraries, etc.

⁷For FY 94, the piggyback tax would generate an estimated \$55.5 million above the 50% rate according to OMB; applying a 4% CPI to the previous year's property tax revenues yields about \$24.5 million. Accordingly, under the Ficker amendment, the property tax base for FY 95 will be eroded by approximately \$31 million $(55.5 - 24.5 = 31)$. This erosion compounds each year.

⁸Assuming the same CPI of 10% and piggyback tax collections of 20 for years two and three.

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the loss realized on⁹ revenues from the real property tax would exceed \$450,000,000.

In short, the Ficker amendment, under present economic conditions, imposes such a severe penalty for levying a piggyback tax in excess of 50% that it amounts to a de facto prohibition of raising the piggyback tax above 50%.

LEGAL DISCUSSION

A. Is the petition legally sufficient?

Md. Ann. Code art 33, Section 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 petitioning amendments to the Montgomery County Charter issued by the Montgomery County Board of Supervisors of Elections in March 1990 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 (1984), requires that the complete text of the proposed amendment be set out in the petition.

In an apparent attempt to satisfy both the Board's requirements and Section 16-11, Ficker included on the face of

⁹There could be, in theory, economic conditions under which the proposed Ficker amendment would be revenue neutral. Under these conditions, the County would have to experience an extremely high rate of inflation coupled with significantly slower growth in income tax collections. Under these circumstances, the CPI would absorb the lost revenue from new construction and the piggyback tax erosion to the property tax base. This scenario appears unlikely given recent economic history. Of course, super inflation would cripple the County budget by dramatically increasing expenditures. It is clear, in any event, that the Ficker amendment would not be revenue neutral under all reasonably expected economic conditions.

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the petition both a statement indicating the purpose of the amendment and the complete text of the proposed amendment.

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). Cf. 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 opinion, the Ficker petition is misleading because it tells the petition signers, on the one hand, that the intent of the amendment is to reduce the property tax only by an amount equivalent to any amount collected from the piggyback tax in excess of 50% (a revenue neutral impact) and, on the other hand, proposes an amendment which severely penalizes the government if a piggyback tax in excess of 50% is imposed. We acknowledge that an extremely cautious and perceptive signer might be able to untangle the petition by ignoring the purpose paragraph and realizing that the proposed amendment, as a practical matter, actually prohibits the County from increasing the piggyback tax above 50%. On balance, however, we believe that a reasonable person would be misled by the Ficker petition.

Under an amendment that was truly revenue neutral, the Council would retain the option of imposing a piggyback tax above 50%. The Council might find such an option in the public interest because many believe the income tax is a more progressive tax than the property tax and, therefore, a more appropriate revenue source. Because the Ficker amendment leads to such draconian revenue loss from the real property tax, the County would be forced, as a practical matter, to abandon any thought of imposing a piggyback tax in excess of 50%.

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 an election is held before a court action is filed challenging procedural errors regarding the adoption of a Charter amendment, the court will not interfere with a 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, 354 A.2d 788.¹⁰ In McDonough the Court of Appeals 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 had a vital influence upon the election. Id. at 801.

In our opinion a misleading petition which would leave a reasonable person in doubt as to its intent is fundamentally flawed and cannot help but have a vital influence on the election. If a petition is misleading, it is impossible to determine that the ballot question has received the necessary approval of 10,000 voters as required by Article XI-A, Section 5, of the Maryland Constitution. Perhaps if the petition signers had not been led to believe that this amendment was revenue neutral, Ficker may not have been able to obtain the necessary 10,000 signatures.¹¹

¹⁰In McDonough the court explained that a legal action challenging procedural errors must be filed prior to an election. The court's decision, however, need not necessarily be rendered prior to the election.

¹¹We note that the ballot question approved by the Council, unlike the Ficker petition, does not contain the misleading statement that the amendment is revenue neutral. Accordingly, this case is unlike Surratt v. Prince George's County, 320 Md. 439, 578 A.2d 715, in which the Court of Appeals struck down an amendment approved by the voters because the ballot question was misleading.

B. Does the amendment conflict with State law?

A provision of a home rule county charter which conflicts with a public general law is invalid. Montgomery County v. Board of Elections, 311 Md. 512, 532 A.2d 641 (1988); Bd. of Supervisors v. Smallwood, 327 Md. 220, 608 A.2d 1222. 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 and Council of Forest Heights v. Frank, 291 Md. 331, 435 A.2d 425 (1981).

Though not free from doubt, we believe that, under the circumstances of this case, the Ficker amendment conflicts with State law because it prohibits that which State law expressly intended to permit. The Ficker petition drive was launched to prevent the County from using the authority granted to it under 1992 Md. Laws Chapter 2. The provisions of the proposed amendment would, if adopted, effectively prevent the Council from utilizing the authority granted to it under Chapter 2 to raise the piggyback tax above 50%.

The Ficker amendment is distinguishable from a property tax cap which was recently approved by the Court of Appeals. In Bd. of Supervisors v. Smallwood, 327 Md. 220, 608 A.2d 1222, the Court considered the validity of proposed amendments to the Anne Arundel and Baltimore County Charters to limit property tax revenues to the amount collected in the previous year plus 2% in Baltimore County and 4.5% in Anne Arundel County. Both amendments were petitioned to the ballot by citizen initiative. The Court of Appeals upheld the validity of the proposed amendments concluding:

If the proposed amendments had been adopted, the County Councils of Baltimore and Anne Arundel Counties could still have exercised discretion to determine the tax rates on property for the next taxable year. A limitation would simply have been placed on its power, so that the increase in property tax revenue for the next tax year could not have exceeded 2% in Baltimore County or 4.5% in Anne Arundel County. The proposed tax limitations would not have had the effect of allowing the electorate of the two counties to

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set the tax rates. As required by Section 6-302(a), the legislative body in each county would continue to set the tax rate on property."

The Ficker amendment, unlike the property tax caps approved in Smallwood, does not place a limit on a generalized power to levy a tax granted by the State but rather prohibits the Montgomery County Council from using a specific and limited authority granted by 1992 Md. Laws Chapter 2 to levy a piggyback income tax above 50% but not exceeding 60%.

In reality the Ficker amendment is an attempt to subject Resolution 12-647 to referendum. Even as a referendum measure, however, the Ficker amendment must fail. Charter Section 114 provides, "Any legislation enacted by the Council shall be submitted to a referendum of the voters upon petition of 5% of the registered voters of the County except legislation (1) appropriating money or imposing taxes" The Ficker petition did not have the approval of 5% of the registered voters of the County. In addition, Resolution 12-647 cannot be the subject of a referendum because the resolution imposes a tax.

C. Is the Ficker amendment inoperative?

Some have suggested that the Ficker amendment, even if approved at the polls, could not take effect. The amendment states, ". . . in any year that the County shall set by . . . resolution, a County income tax of more than 50% to be applied to the State income tax for an individual, the Council shall not levy an ad valorem tax on real property. . ." in excess of an amount established by the provisions of the amendment. Resolution 12-647 which was adopted on May 11, 1992, set the piggyback tax at 60%, the maximum amount allowed under 1992 Md Laws Chapter 2. Resolution 12-647 is continuing in nature. See note 2 above. Therefore, the Council arguably will not be taking action to levy a piggyback tax in excess of 50% after the

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Ficker amendment would go into effect if approved by the voters.¹²

In construing a statute one 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). The language of a statute must be read in the context of the effect one construction has over another; the construction which promotes the purpose of the act is to be favored. Illogical results should be avoided. Id. at 513. There is a presumption that an act is intended to accomplish some purpose. Swarthmore Company v. Kaestner, 258 Md. 517, 266 A.2d 341, 345 (1970).

Under the Ficker amendment, the property tax limitation becomes operational in any year the Council "shall set" the piggyback tax in excess of a 50% rate. We believe that a court would construe this language to mean that the property tax cap imposed by the amendment becomes operational in any year that a piggyback tax in excess of 50% is levied by the County. To construe the language otherwise would clearly frustrate the purpose of the Ficker amendment in its entirety, rendering it not only inoperative but probably illegal.¹³

CONCLUSION

While not free from doubt, we believe that the petition initiated by Ficker was fundamentally misleading because it failed to apprise the signer of its true intent, i.e., to forbid the Council from using recently acquired State authority to increase the piggyback tax rate above the 50% rate. In

¹²We note that 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, 646.

¹³Given the language used in the Ficker amendment, the drafter apparently was unaware that Resolution 12-647 imposed a piggyback tax rate that continued in effect from year-to-year without further Council action.

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addition, we believe that the Ficker amendment is invalid because it proposes to prohibit what the State has expressly permitted the County Council to do, i.e., increase the County piggyback tax above 50% up to a maximum level of 60%.

We trust you will find this memorandum responsive to your inquiry.

1015.MPH:rpc
92.04112

cc: Neal Potter, County Executive
Bruce Adams, President, County Council
Gene Lynch, Chief Assistant to the County Executive
William Hussmann, Chief Administrative Officer
Robert K. Kendal, Director, Office of Management and Budget
Steven Farber, Council Staff Director
Henry Bain, Special Assistant to the County Executive
H. Christopher Malone, Senior Assistant County Attorney
Martin Brubaker, Office of Management and Budget
Ben Bialek, Senior Legislative Counsel
Michael Faden, Senior Legislative Counsel
Justina Ferber, Legislative Analyst

PETITION FOR REFERENDUM

To Amend the Charter of Montgomery County
TO: President of the County Council of Montgomery County:

The undersigned registered voters of Montgomery County do hereby petition you to have submitted to the registered voters of said Montgomery County for approval or rejection at the next general election the following amendment of the Charter of Montgomery County in accordance with the provisions of Article XI-2 of the Constitution of Maryland:

SUBJECT MATTER OF PETITION

It is the intent of this amendment to require that the County Council, when increasing county piggyback income tax revenues above 50% of the state income tax, decrease county property tax revenues, as adjusted for inflation, by the equivalent amount.

"the following words shall be added to Section 305 of the Charter, Approval of the Budget; Tax Levies.—'Provided, however, that in any year that the county shall set by ordinance or resolution a county income tax of more than 50% to be applied to the state income tax for an individual, the Council shall not levy an ad valorem tax on real property to finance the budgets that will produce total revenue that exceeds the total revenue produced by the tax on real property in the preceding fiscal year plus the Consumer Price Index increase percentage of the previous year's real property revenues, minus the county income tax revenue in excess of 50% to be applied to the state income tax for an individual.'"

1)
Signature _____
Print Name _____
Home Address _____
Town _____ Zip _____

6)
Signature _____
Print Name _____
Home Address _____
Town _____ Zip _____

2)
Signature _____
Print Name _____
Home Address _____
Town _____ Zip _____

7)
Signature _____
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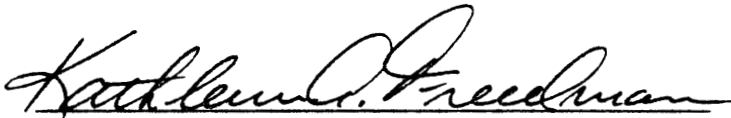
10)
Signature _____
Print Name _____
Home Address _____

The ballot title shall be designated and read as follows:

Question A

Amend Section 305 of the County Charter to provide that in any year that the County shall set a County income tax of more than 50% of the state income tax for an individual, the Council shall not levy an ad valorem tax on real property that will produce total revenue that exceeds the total revenue produced by the tax on real property in the preceding fiscal year plus the Consumer Price Index increase percentage of the previous year's real property revenues, minus the county income tax revenue in excess of 50% of the state income tax for an individual.

This is a correct copy of Council action.



Kathleen A. Freedman, CMC
Secretary of the Council