

**Virginia State Corporation Commission  
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**Case Number (if already assigned)** clk-2009-00012

**Case Name (if known)**

**Document Type** EXML

**Document Description Summary** Memorandum of Law concerning the underlining merits of case, namely that the citizen petitions are valid making the articles of incorporation be NOT "conforming to law"

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VIRGINIA:

BEFORE THE STATE CORPORATION COMMISSION  
At Richmond, July 20, 2009

DOUGLAS ROBERT JOHNSON  
Petitioner,

v.

Case No.: CLK-2009-00012

FLUVANNA COUNTY BOARD OF SUPERVISORS,  
LOUISA COUNTY BOARD OF SUPERVISORS,  
and  
JAMES RIVER WATER AUTHORITY,  
Respondents.

MEMORANDUM OF LAW CONCERNING MERITS

COMES NOW your Petitioner, Douglas Robert Johnson, concerning the underlining merits of this action, respectfully says as follows:

1. That there is no question that should the citizen petitions be valid, a referendum would be needed before the Authority could be established;

2. That it is understood that, should the previously filed Motions for Dismissal by Respondents and the Clerk of the Commission made under this case be granted, this pleading would be still a part of the record;

3. That it is understood that, should the previously filed Motion for Summary Judgement by Petitioner made under this case be granted, this pleading would not be needed to be addressed;

4. The actions of the Petitioner, both in the Commission action and with the Fluvanna Circuit Court, are being done using

the *Morrisette v. McGinniss*, 246 Va. 378; 378 S.E.2d 433 (1993) Supreme Court Decision as a "Play Book":

Of greater significance, however, is the effect of the Commission's order issuing the Authority's corporate charter. As we have noted, Code § 15.1-1246 provides that when the charter is issued, "such authority [\*\*\*8] shall be conclusively deemed to have been lawfully and properly created and established and authorized to exercise its powers." That order was unchallenged and became final. Therefore, no subsequent act of the Registrar or the County Board could affect the force of the Commission's order or undo the creation of the Authority once the conclusive presumption of § 15.1-1246 attached. [\*383] Thus, the trial court correctly ruled that mandamus would not lie under the circumstances of this case. [Emphasis added]

5. Step 1 was (is) to challenge the action of the Commission before it became final so that the "conclusive presumption" would NOT "attach".

6. Step 2 is to have either the Commission or the Fluvanna Circuit Court rule on whether or not the citizen petitions were valid. This should be relatively simple as the standard mentioned in that Supreme Court Decision is "substantial compliance." It is anticipated that no further legal action would then be needed.

7. Discussions of the law up to this point have dealt mainly with Step 1 mentioned above. The following deals with Step 2, the actual merits of the underlining issue of the citizen petitions.

8. The chronology of events leading up to the action filed with the Commission is as follows:

March 18, 2009 - Citizen Petition containing over 2,000 signatures was filed with Fluvanna Board of Supervisors. County Attorney Fred Payne stated his opinion that the Petition form should have been presented first to the Fluvanna

Circuit Court but the Board voted to review the citizen petitions.

March 19, 2009 - Based on the concern of Mr. Payne, Petitioner Douglas Robert Johnson filed a copy of the blank petition form with the Fluvanna Circuit Court and received official acceptance on March 24, 2009 which specified filing of Petitions with the Court.

April 15, 2009 - A second petition, also containing over 2,000 signatures, was filed with the Court as required by the March 24, 2009 Certificate of Receipt and Acceptance. A full copy of all petition pages was also filed with the Fluvanna Board of Supervisors at the beginning of their April 15, 2009 meeting. [Underlined for emphasis.]

April 16, 2009 - Judge Berry issued Order Setting A Hearing on May 15, 2009.

April 17, 2009 - Petitioner sent letter to Clerk of Commission challenging the then impending filing.

April 20, 2009 - A separate action, 09CL81, was filed with the Fluvanna Circuit Court by a group of citizens that did NOT include Petitioner Douglas Johnson.

April 21, 2009 - Commission issued certificate or charter.

April 24, 2009 - Petitioner Douglas Johnson started action CLK-2009-00012 with Commission.

9. While case CLK-2009-00012 is before the Commission and three actions are before the Fluvanna Circuit Court, just who will be dealing with the merits has not been decided. This document deals strictly with the merits and not who should decide the issue.

10. Still following the Morrissette case: "Morrissette should have taken prompt action immediately after the public hearing to seek judicial review of those allegedly erroneous actions". In this case, the "allegedly erroneous actions" did not occur until April

15, 2009 and not March 18, 2009 as between those two dates, the citizen petitions were being reviewed.

#### DISCUSSION OF FIRST PETITION

11. The first petition was submitted in full compliance with the Virginia Water and Waste Authorities Act. The specific code sections are two, § 15.2-5100 "Title of chapter" and § 15.2-5105 "Hearing; referendum".

##### § 15.2-5100. Title of chapter.

This chapter shall be known and may be cited as the "Virginia Water and Waste Authorities Act." This chapter shall constitute full and complete authority, without regard to the provisions of any other law for the doing of the acts herein authorized, and shall be liberally construed to effect the purposes of the chapter. [Emphasis added.]

(Code 1950, § 15-764.1; 1950, p. 1312; 1962, c. 623, § 15.1-1239; 1997, c. 587.)

##### § 15.2-5105. Hearing; referendum.

If at the hearing, in the judgment of the governing body of the participating locality, substantial opposition is heard, the governing body may at its discretion petition the circuit court to order a referendum on the question of adopting or approving the ordinance, agreement or resolution. The provisions of § 24.2-684 shall govern the order for a referendum. When two or more localities are participating in the formation of such authority, the referendum, if ordered, shall be held on the same date in all participating localities. If ten percent of the qualified voters in a locality file a petition with the governing body at the hearing calling for a referendum, such governing body shall petition the circuit court to order a referendum in that locality as provided in this section. [Emphasis added.]

(Code 1950, § 15-764.6; 1950, p. 1315; 1962, c. 623, § 15.1-1244; 1970, c. 617; 1972, c. 370; 1973, c. 478; 1975, c. 517; 1997, c. 587.)

12. § 15.2-5100 "Title of chapter" has two significant points

that are critical to the validity of the petition. The first is that the citizen petitions must be evaluated according to this Act "without regard to the provisions of any other law".

13. The second significant point is that the evaluation of the citizen petitions must not be scrutinized. The exact wording of the code referring to the citizen petitions must be "liberally construed". That would mean that technicalities should be overlooked when determining whether the spirit of the code was met.

14. There are a number of purposes specified in § 15.2-5105. One of which is for the citizens to force a referendum on the formation of the authority. Therefore, according to § 15.2-5100, "shall be liberally construed to effect the purposes of the chapter", actual says that:

The specific statement in § 15.2-5105, "If ten percent of the qualified voters in a locality file a petition with the governing body at the hearing calling for a referendum, such governing body shall petition the circuit court to order a referendum in that locality as provided in this section", "shall be liberally construed to effect the purposes of the chapter", namely, in this instance, "to order a referendum".

15. According to the logic presented in item 14 above, the Fluvanna Board of Supervisors was obligated to accept the citizen petitions on face value with over 2,100 signatures. The Board failed to do so on March 18, 2009 but instead called for an evaluation of the citizen petitions to be reported on at the April 15, 2009 evening meeting of the Board.

16. From March 18, 2009 through April 15, 2009, the County

Administrator oversaw the evaluation of the citizen petitions by his staff following the guidelines given him by the County Attorney.

17. On April 15, 2009, the County Administrator delivered a written report to the Board which listed over 1,800 valid signatures and over 300 invalid signatures. The number required to reach the 10 percent figure specified in the code is a number less than 1,700. This was conclusive proof that the conditions of § 15.2-5105 were met to the letter of the law. There was, at that point, an absolute obligation for the Board to "petition the circuit court to order a referendum".

18. The Board then voted by a four to two vote to reject the petitions.

19. The Board then immediately voted, again four to two, to establish the authority by approving the James River Water Authority Articles of Incorporation. Because the Board rejected the valid petitions, this vote did not conform to law. That means that the Articles of Incorporation did not conform to law.

20. § 15.2-5108 specifies that the State Corporation Commission "shall issue a certificate of incorporation or charter to the authority if it finds that ... [t]he articles of incorporation conform to law...." The issuing of the certificate does not make the articles conform to law. They either conform to law or not before the certificate is issued.

## TECHNICALITIES

21. On March 18, 2009, the County Attorney mentioned a possible technical defect to the citizen petitions. He said that another statute might be needed to be complied with in order for the citizen petitions to be valid. (This is refuted in item 12 above.) He stated that it was not a certainty but only his opinion. He said that "only the men in the black robes can make that decision". These statements are on the audio recordings made at each Board meeting.

22. The technicalities listed in that code include such things as the size of the paper used. In an apparent effort to keep petitioners from circulating a petition form having some such technical defect and to collect another fee for the state, one of the requirements is to have the petition form checked by the Clerk of the Court.

23. Just to be on the safe side, Petitioner Douglas Johnson filed a true copy of the blank Petition Form used with the citizen petition with the Clerk of the Court on March 19, 2009 following exactly the rules specified by the State Board of Elections. The Clerk approved the Petition Form without any changes whatsoever. This overcame the possible technical difficulty specified by the County Attorney.

24 No technical difficulty should ever be used to throw out a pleading as specified:

§ 8.01-275. When action or suit not to abate for want of form; what defects not to be regarded.

No action or suit shall abate for want of form where the motion for judgment or bill of complaint sets forth sufficient matter of substance for the court to proceed upon the merits of the cause. The court shall not regard any defect or imperfection in the pleading, whether it has been heretofore deemed misleading or insufficient pleading or not, unless there be omitted something so essential to the action or defense that judgment, according to law and the very right of the cause, cannot be given.

(Code 1950, §§ 8-102, 8-109; 1954, c. 333; 1977, c. 617.)

25. The citizen petition conforms to this second law to the letter with the singular exception for the timing of the approval of Petition Form by the Clerk of the Court. Certainly this is not "something so essential" to justify rejecting the petitions.

#### **THE SECOND CITIZEN PETITION**

26. When the individuals who circulated the first citizen petition saw the March 24, 2009 Certificate of the Clerk of the Court, some of them decided to circulate the same Petition Form again. The only difference in the petitions were the dates that the citizens signed the form.

27. Petitioner Douglas Johnson did not think this was a good idea at the time but afterwards joined in when the others had already gathered a large number of signatures.

28. The written rules of the State Board of Elections and the official Certificate of Acceptance by the Clerk of the Court both specified filing the Citizen Petition to the Court and NOT to the Board.

29. On April 15, 2009 over 2,100 signatures on over 100 Petition Forms were filed first with the Court and later that day also with the Board.

30. Case 09CL81 goes into detail why the second petition is valid. Those arguments are incorporated here and made part of this pleading in their entirety. This includes the entire Complaint with attachments and the entire Motion for Injunction again with attachments. Both documents were previously filed with the Commission on April 30, 2009 as Exhibits D and E of Petitioner's Affidavit.

#### **CONCLUSION**

31. It is understood that this pleading is an expansion of the Statement of Facts in the original Petition on case CLK-2009-00012. It is not an attempt to add more items but to just go into the detail needed to make a determination on the merits of the case.

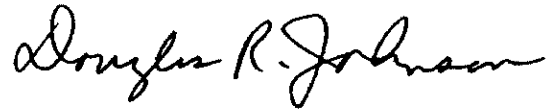
32. Respondents have already stated that they believed certain aspects of this action should be made in the Fluvanna Circuit Court yet Respondent Fluvanna Board of Supervisors states the opposite when filing with the Fluvanna Circuit Court.

33. The Fluvanna Circuit Court is reluctant to deal with the merits while the action with the Commission is pending.

34. Petitioner Douglas Johnson will not rest until the merits are dealt with in some court.

Wherefore this plaintiff respectfully requests original  
Petition be granted on the merits.

DATED: July 20, 2009

A handwritten signature in black ink that reads "Douglas R. Johnson". The signature is written in a cursive style with a large, prominent "D" and "J".

Douglas R. Johnson, Pro se

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pro se

CERTIFICATE OF SERVICE

I hereby certify that a true copy of this pleading was mailed the 20th day of July, 2009, to:

DEFENDANT FLUVANNA COUNTY BOARD OF SUPERVISORS at:

Frederick W. Payne, Esquire  
Fluvanna County Attorney  
414 East Jefferson Street  
Charlottesville, VA 22902

and

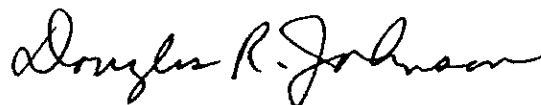
DEFENDANT LOUISA COUNTY BOARD OF SUPERVISORS at:

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and

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