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IN THE CIRCUIT COURT OF FAIRFAX COUNTY

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KRISH KARUNAKARAM, et. al., :

6

Plaintiffs, :

7

VS : CL No. 2005-4013

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THE TOWN OF HERNDON, et. al., :

9

Defendants. :

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Friday, December 16, 2005

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Fairfax, Virginia

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The above-entitled cause came to be heard before the Honorable Kathleen H. MacKay, a Judge in and for the Circuit Court of Fairfax County, in courtroom 5F, Fairfax County Judicial Center, 4110 Chain Bridge Road, Fairfax, Virginia, beginning at approximately 12:00 o'clock p.m., when there were present on behalf of the respective parties:

TS05-177

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P R O C E E D I N G S

1
2 (The court reporter was sworn by the
3 Court.)

4 THE COURT: Okay. Would you introduce
5 everybody and tell me who they are so we can get a good
6 start?

7 MS. LOCKETT: Your Honor, my name is
8 Corinne Lockett. I'm with the County Attorney's Office.
9 I'm Assistant County Attorney representing the County of
10 Fairfax.

11 THE COURT: Okay.

12 MR. DUDLEY: Good morning, Your Honor.
13 Waller Dudley from McGuire Woods for the Town of Herndon.
14 With me is Richard Kaufman, who is the town attorney.

15 MR. LONG: Michael Long with the County
16 Attorney's Office for the County.

17 THE COURT: Okay. And for the Defendants?

18 MR. HURD: Your Honor, I'm Bill Hurd from
19 Troutman Sanders for the Plaintiffs. With me is Jim
20 Peterson of Judicial Watch, counsel for the Plaintiffs,
21 and also one of the Plaintiffs, Susan Powell.

22 THE COURT: Okay. This is the --

23 MR. DUDLEY: Actually, Your Honor, it is

1 the demurrers of the Town and the County.

2 THE COURT: -- demurrers and plea in bar.

3 MR. DUDLEY: Thank you, Your Honor. May
4 it please the Court, I'm Waller Dudley for the Town of
5 Herndon. I appreciate your patience with the time limit,
6 but I'm going to try to move as quickly as I can.

7 We are here, of course, to test the
8 Amended Bill of Complaint filed by Judicial Watch. So,
9 it seems to me the first order of business is to look
10 simply at what the Plaintiffs have pleaded. The first
11 point is simple, but it really is very important. The
12 Plaintiffs, of course, are only the named individuals in
13 the Amended Bill of Complaint. The Plaintiffs are not
14 the Judicial Watch entity --

15 THE COURT: Yes.

16 MR. DUDLEY: -- whose Web site says that
17 they fight government corruption. The Plaintiffs claim
18 in the Amended Bill of Complaint that they are taxpayers
19 and residents of either Herndon or Fairfax County.
20 That's it, Your Honor. There is not a single other fact
21 about them, about why they have been harmed as
22 individuals, or why they are somehow different from the
23 public, at large. There is, for example, no claim of

1 living near some location or otherwise how they are
2 impacted or damaged.

3 The next point is also simple, but it is
4 critical, Your Honor. Regardless of the suits of
5 clothes, if you will, that the Plaintiffs may want to put
6 on their case, their Amended Bill of Complaint makes
7 clear that as to Herndon it is simply an attack on the
8 granting of the conditional use permit. In Paragraph 14
9 of the Amended Bill they cite that Herndon granted the
10 conditional use permit. And as to Herndon, that alone is
11 the act that is being challenged.

12 Indeed, in Paragraph 42 of the Amended
13 Bill the Plaintiffs themselves say when a municipality's
14 grant of a conditional use permit is challenged, as they
15 are doing, the Plaintiffs must show that it is arbitrary
16 capricious. So, that boiled down is what the case
17 against Herndon is all about.

18 The next point I would call to the Court's
19 attention, respectfully, from the Amended Bill of
20 Complaint itself is that there is no allegation of actual
21 funding or levying of taxes by the Town of Herndon. And
22 my point here before I move to the real arguments is that
23 if this is said to be a so-called taxpayer suit, which I

1 expect you will here, there is a facial and, in our view,
2 fatal defect on that theory, because there is no
3 allegation of any such taxes being levied.

4 Our arguments from the papers, Your Honor,
5 are broken into two parts. We have some arguments that
6 we believe run through each of the counts of the Amended
7 Bill, and I will talk about those first; and then we have
8 a few that are count-specific. As to all four counts --
9 And I should say, of course, I adopt the arguments in all
10 of our papers. I may not touch upon each of them, but I
11 rely on the papers -- and that is that a declaratory
12 judgment is not available under this Amended Bill as it
13 is pleaded.

14 There are four reasons for that. To have
15 a valid declaratory judgment, which is the case the
16 Plaintiffs would like to have, the Plaintiffs, these
17 individuals, must have a personal stake and a claim in
18 the case. The cases talk about having a specific adverse
19 claim against the other party. Stated another way, there
20 must be this actual controversy between the parties.

21 The next point is, of course, under
22 Hornbook DJ law there must be an actual antagonistic
23 assertion and denial of right. It is a time honored

1 phrase that we all remember, maybe even from law school.
2 And, curiously, the Bill of Complaint is silent as to
3 that. There is no allegation that that kind of
4 legitimate DJ controversy exists.

5 I would like to give the Court a couple of
6 simple illustrations by way of contrast to help Your
7 Honor decide whether we are correct in saying this is not
8 a properly brought DJ case. Example one would arise in
9 the context of an insurance policy where there is a
10 carrier and there is an insured under the policy. The
11 question and the dispute that has boiled over is whether
12 there is coverage. The insured has said there is. The
13 carrier has said, no, there isn't. There is a policy.
14 We have an actual controversy. And those parties come to
15 this Court and say sort it out, we have an actual
16 antagonistic assertion and denial of my rights under this
17 policy, make a declaratory judgment.

18 The second simple example would be where
19 property owners have a dispute about access. If one says
20 I'm entitled to use that road to get to my property and
21 the other says, no, you are not, you have no such legal
22 right, a declaratory judgment would be proper to sort
23 that out because there is this actual controversy between

1 the litigants.

2 A declaratory judgment, in other words,
3 cannot be based on generalities, general complaints,
4 speculative facts about what may or may not happen in the
5 future. It must involve a controversy between the
6 litigants. And that is the first basis that we claim to
7 be lacking throughout the Amended Bill of Complaint and,
8 therefore, the declaratory relief that they seek is
9 unavailable to them.

10 The second point is standing. I have
11 pointed out to Your Honor, and I hope Your Honor's review
12 of the papers leads you to conclude that I'm right, that
13 this is an attack on the granting of the conditional use
14 permit. That is what they are complaining about. Under
15 time honored Virginia law, if that is what you are doing,
16 you have to say how you, as an individual Plaintiff, are
17 injured by that legislative land use decision.

18 THE COURT: Do you not think that there is
19 something different about this case? Don't you give them
20 any credit whatsoever for alleging that the illegal acts
21 being, I guess, abetted by this particular decision, that
22 doesn't mean anything to you in terms of your argument?

23 MR. DUDLEY: I take the difference that

1 they see in looking ahead to say it may turn out that
2 what are found to be illegal activities may take place on
3 this site. But the law when one challenges the granting
4 of a permit is these Plaintiffs usually say I applied for
5 the permit, it is my property, they won't give it to me,
6 it hurt me, and my individual claim is A, B, C, D. There
7 are no cases I can find when this sort of political
8 debate, in our view, is converted somehow into standing
9 to attack the granting of the conditional use permit.

10 And keep in mind, as I've pointed out,
11 there is no allegation in this Amended Bill of Complaint
12 that any of their specific personal or real property has
13 been damaged in some way. In our view, Your Honor, these
14 two fundamental defects end the inquiry, and the Court
15 need not go further to determine whether Herndon's
16 demurrer should be sustained because these points are
17 dispositive.

18 We have additional points, and I will turn
19 to those, related to the specific counts in the Amended
20 Bill. As to Count I we have, of course, argued there is
21 no private cause of action under the federal immigration
22 laws. Now, the Plaintiffs say, I think, wait a minute,
23 that is not what we are doing, we are not trying to

1 assert a private cause of action under the federal
2 immigration laws. And my way of illustrating that they
3 are wrong, Your Honor, is to ask the Court to do what I
4 have done. If you delete those references to those
5 federal statutes and those concepts from the Amended
6 Bill, there is simply nothing left by way of their claim
7 under Count I. That is what it is about. It is
8 inextricably a claim that there is a violation of the
9 federal statutes.

10 And, indeed, this sharpens the problem
11 that the Plaintiffs have, Your Honor. It is precisely
12 that they do not have and have not alleged, as I
13 explained a moment ago, a proper basis to challenge the
14 granting of the permit. They try in vain, in my view, to
15 reach out to a federal statute and say that gives us a
16 basis to mount a traditional Virginia land use challenge
17 to the granting of the permit. And I can't find any case
18 that authorizes that approach.

19 The next illustration is, Your Honor, if
20 you look at the Town ordinance 7891 and the resolution by
21 which the permit was granted it brings into focus this
22 defect. Why? Because 7891, on which they would like to
23 rely, talks about the conditions for issuance of this

1 kind of permit. And you will not be surprised to know,
2 of course, those relate to health, safety, welfare.
3 There are three prongs of it -- I won't burden the record
4 by reading them -- but that is in the Town's ordinance.

5 There is no allegation in this Amended
6 Bill of Complaint that any of those were violated, and
7 the reason could hardly be more persuasive. It is
8 exactly because if you look at the resolution granting
9 the permit, the Town Council expressly found that those
10 things were met, and it granted the permit. So, it is no
11 small wonder that the Plaintiffs do not, as one normally
12 does in this kind of case, point to the ordinance, point
13 to the terms, and say this one has been violated. It is
14 not there.

15 Count II is the Virginia statutory claim.
16 I know Ms. Lockett is going to address that. I will
17 simply say I'm not the most experienced guy around, but I
18 have never heard of a case in which a claim goes forward
19 on the basis of a statute that is not yet law. I don't
20 have anything else to add on that theory. That is Count
21 II, and it is dispositive.

22 Count III is, as far as I can tell, an
23 attempt to make out a Dillon's Rule challenge. And this

1 is a remarkable theory advanced by the Plaintiffs,
2 because here is what they are asking the Court to do.
3 They make the argument that because the Virginia Code
4 does not expressly list this kind of permit as being one
5 which can be passed, it is, therefore, ultra vires; you
6 can't do it. So, Your Honor, it is not hard to follow
7 that through and see where it would take us. It would
8 run into two huge problems.

9 First of all, even they concede that
10 Dillon's Rule has always included the granting of implied
11 powers to localities. So, that alone disposes of the
12 argument that because there is no Virginia Code section
13 that says you can enact this kind of conditional use
14 permit it is invalid. And if they are right, Your Honor,
15 what we are going to have to do is rewrite the land use
16 part of the Code to over every imaginable circumstance.
17 And I submit to you, with all due respect, that simply
18 can't be.

19 Now, if that is not enough, we have also
20 cited 15.2-1100. If there is any doubt, that statute
21 removes it because it apparently predicted this argument
22 by the Plaintiffs. It certainly is on point and it says
23 the enumeration of specific powers is not exclusive, nor

1 is it a limitation on what localities can do. So, for
2 those reasons, Count III goes away. It is not a valid
3 Dillon's Rule challenge.

4 Count IV we have two points. The first is
5 -- and this is labelled ultra vires action -- Again, it
6 is at time hard to distinguish it from Count III, but
7 they are basically saying you exceeded your authority in
8 doing this; it is ultra vires; it is arbitrary and
9 capricious. The foundation for that claim does not exist
10 because, on its own terms, the Amended Bill of Complaint
11 Count IV is based again entirely on the federal
12 immigration statutes and the Virginia statute not yet in
13 effect. If you cover that up, as if with a post-it note,
14 so to speak, there is nothing there, and Count IV fails
15 on that basis.

16 The second defect in Count IV is that if
17 you are trying to plead this kind of claim you must
18 allege facts by which the Court could find that the
19 granting of the CUP was arbitrary or capricious. The
20 case on point, Your Honor, is called Taxpayers of
21 Brunswick County against Brunswick County, found at 249
22 Virginia 320. And the Virginia Supreme Court said very
23 simply conclusory allegations that the County Board acted

1 arbitrary and capriciously and in violation of, in that
2 case, Your Honor, the Waste Management Act, by approving
3 a conditional use permit for a landfill did not state a
4 cause of action, period. And this is because in
5 Virginia, even at the demurrer stage, pure conclusory
6 allegations are not enough, and there are no facts in
7 Count IV which provide the necessary support.

8 In sum and conclusion, Your Honor, the
9 case has been thoroughly briefed. It goes without saying
10 that there is a lot of attention being paid to the
11 matter. There certainly is a lot of notoriety to the
12 broader issues. And I will say this in conclusion, Your
13 Honor. There are federal laws which regulate
14 immigration. There are laws which speak to the hiring of
15 undocumented workers. There is a Congress and there are
16 many political and legislative forums open to anyone who
17 wants to be heard on issues of immigration and policy.

18 None of that, Your Honor, in our view,
19 impacts the ability of the Town of Herndon to do what all
20 towns do to deal with their purely local concerns -- and
21 in this case, their land use issues -- after careful
22 procedures were followed, extensive public hearings and
23 debate, and a vote was taken. And that is all that

1 happened here, Your Honor. And for the reasons advanced
2 in our papers and this morning, we ask you to sustain the
3 Town's demurrer and dismiss the Amended Bill.

4 THE COURT: Let me ask you a question
5 before you yield the floor. What do you make of the
6 Goldman case in terms of standing?

7 MR. DUDLEY: I think we addressed that in
8 our papers, Your Honor. The Goldman case actually was
9 decided against the Plaintiffs there who were trying to
10 say we want a writ of mandamus against the comptroller,
11 as I recall it, because he is approving unauthorized
12 expenditures. And the Court said, no, that is not
13 available to you.

14 THE COURT: But Justice Keenan went
15 through a long analysis of the right of taxpayers to
16 challenge the legality of expenditures by local
17 governments, and she went through a whole bunch of
18 different instances where that is approved, and she
19 differentiated between the taxpayers' relationship to the
20 local government and the state government and the federal
21 government.

22 MR. DUDLEY: That's correct, Your Honor.
23 But, remember, way back at the beginning we pointed out

1 that under this Amended Bill there is no allegation of
2 such expenditure.

3 THE COURT: So, is that how you
4 differentiate it? They are supplying a building; right?

5 MR. DUDLEY: They are allowing the
6 nonprofit group to operate the site in what was the
7 Town's police station that is now vacant. That is all.
8 So, yes, that is certainly a critical difference. And I
9 think we can be sure that if it were more than that, that
10 allegation would be in the Amended Bill, and it isn't.
11 So, yes, I understand that there are some cases -- and
12 our reply brief went through ad seriatim the ones cited
13 by the Plaintiffs in their opposition papers and
14 explained why -- and I think this is what Your Honor is
15 saying -- yes, in some cases where there are certain
16 allegations this kind of, quote, taxpayer suit might be
17 proper. This is a challenge to the granting of a permit.
18 It is not that kind of taxpayer suit, and that is our
19 position.

20 THE COURT: Let me ask you a question. It
21 may be odd, but I wonder if -- are you saying that -- I'm
22 concerned about the illegalities of the activities that
23 they are concerned about. So, if there were drug dealing

1 in the building that were given over to a group, or
2 prostitution, or any other crime that you could think of,
3 your argument would be the same? The taxpayers would not
4 have the basis to ask the Town of Herndon to stop renting
5 a building to someone who was conducting criminal
6 activity out of the building? I mean, that is an extreme
7 case but --

8 MR. DUDLEY: It certainly is.

9 THE COURT: I mean, it isn't this case.
10 I'm trying to think of where your argument -- where you
11 would go at that point.

12 MR. DUDLEY: Well, Your Honor, I think,
13 actually, you point out something that helps the Town of
14 Herndon, because the kind of case you are describing
15 would be based on present existing facts, allegations of
16 that kind of conduct, presumably proof of it, who is
17 doing what and who is not doing what. And whether the
18 Town would be susceptible to a suit for that kind of
19 activity would raise new questions of sovereign immunity,
20 et cetera, et cetera. But you are looking at things that
21 may happen in the future under a hypothetical. And this
22 case is directly devoted to in August you granted the
23 permit, and that is the act that was invalid. So, it is

1 not addressed to -- nor could it be --

2 THE COURT: But they make allegations that
3 there was a survey, and that people understood that the
4 people that were going to be using that center were going
5 to be people who were documented. If you think all of
6 that is speculative -- Is that what your argument is?

7 MR. DUDLEY: It is speculative in this
8 context of you, the Town, unlawfully granted the permit
9 under the way those cases get decided. And, Your Honor,
10 I don't fail to understand why you are asking those
11 questions and why a number of the folks in the audience
12 here are concerned about immigration. But we are in a
13 Virginia state court challenging the granting of this
14 kind of particular permit, and there are rules, and there
15 are decisional cases that relate to those. But I don't
16 want anybody to misunderstand that we just don't see the
17 broader national immigration issue that is raging,
18 according to some, across the country. It is there, but
19 that is not what this Amended Bill is properly about.

20 THE COURT: Thank you.

21 MR. DUDLEY: Thank you, Your Honor.

22 MS. LOCKETT: Corinne Lockett on behalf of
23 the County.

1 I am going to do my best not to reiterate
2 what Mr. Dudley has already so eloquently argued.

3 THE COURT: Let me ask you a quick
4 question.

5 MS. LOCKETT: Certainly.

6 THE COURT: Why in your brief did you
7 procedurally go through everything -- a demurrer and a
8 plea in bar, a demurrer and a plea in bar, a demurrer and
9 a plea in bar? What was the rationale behind that
10 organization?

11 MS. LOCKETT: Your Honor, we wanted to not
12 only -- We believe that the portions that we argued in
13 the plea in bar also bring up facts that were not part of
14 the suit. In a demurrer, you are restricted to assuming
15 that all of what the Plaintiff has alleged are true; that
16 there is still no -- that they can't prove their cause of
17 action. Under a plea in bar, of course, we submitted
18 some additional facts for you to consider which wouldn't
19 be appropriate to include in a demurrer. So, we split
20 them up that way so that no one could argue that we were
21 trying to insert additional facts into our demurrer
22 arguments.

23 THE COURT: Okay.

1 MS. LOCKETT: Your Honor, as I was saying,
2 I will try not to reiterate what Mr. Dudley has said.
3 The County, of course, comes at this from a slightly
4 different perspective than Herndon does. Herndon does
5 come at this from more of a land use type perspective.
6 Fairfax County has been --

7 THE COURT: Making expenditures.

8 MS. LOCKETT: Allegedly -- allegedly
9 making expenditures to elicit illegal purposes, and I
10 will start with that a little bit. It is not what I
11 intended to start with, but let me just give you a broad-
12 based picture based upon the questions that you've
13 already asked.

14 The expenditures have been made. But if
15 you look at the Bill of Complaint very carefully, the
16 Bill of Complaint -- the Amended Bill of Complaint --
17 this is their second bite at the apple -- they forgot to
18 include us the first time -- The Amended Bill of
19 Complaint fails to tie any of their allegations to
20 Fairfax County through the way that they have set their
21 counts up.

22 Count I. If you look at it carefully,
23 Count I specifically alleges that the County has violated

1 various criminal statutes. They list a whole bunch of
2 immigration statutes that allegedly this funding will
3 lead to the violation of. The first point on that is
4 could possibly lead to the violation of those statutes.
5 There is no factual allegation that it will lead to the
6 violation of any of those statutes. A survey was done,
7 possibly some people that may be coming to this site will
8 not be documented workers and may get services that
9 otherwise they shouldn't get under the statutes. It is
10 speculation. It is an allegation without any backing in
11 the Bill of Complaint itself. And it specifically says
12 that we are violating federal criminal -- criminal --
13 statutes.

14 And if you look at the criminal statutes
15 and the remedies thereunder, the remedies under those
16 criminal statutes are jail time and fines. That is not
17 what they are looking for here. All of what they are
18 asking for here is, specifically, the declaratory
19 judgment to enjoin us from continuing to give those
20 funds. So, the statutes that they are asking you to
21 enforce, you know, through their pleadings, you can't
22 enforce them the way they want them to be enforced
23 because the remedies that they are asking for under those

1 statutes are criminal remedies, and they are not asking
2 for those.

3 So, my argument is there is no vehicle to
4 get these taxpayers from point A of being taxpayers who
5 pay taxes to the County to having you enforce federal
6 statutes. It is really the job of federal and state
7 prosecutors to enforce those. Those are criminal acts
8 that they are talking about. They are trying to enjoin
9 us from expending money on a program to help needy
10 people. And they are taking a large jump from that
11 stance to, okay, now the Circuit Court should keep the
12 County from spending that money because that money could
13 possibly go towards illegal acts when that is not this
14 Court's position under this type of case.

15 The Plaintiffs, after we filed our
16 demurrer and plea in bar, they go back and in their reply
17 brief for the very first time allege that under Section
18 1-248 of the Code, that gives them somehow the legal
19 vehicle to have you enforce these criminal -- have you
20 enforce the imposition of these criminal laws -- federal
21 criminal laws -- in this case. And I'm hoping that you
22 have had a chance to take a look at 1-248. It is an
23 introductory Code section dating back to 1887 prior to

1 the formal adoption of the Dillon Rule. It is a generic
2 catch-all stating that -- stating the obvious; i.e. that
3 local money and expenditures and laws shouldn't violate
4 state and federal law.

5 There is nothing in that Code section, or
6 anything tied to that Code section, which gives them the
7 remedies that they seek. There is nothing in that Code
8 section or any of the cases that are cited thereunder
9 that tie in at all to the fact that they are trying to
10 take an introductory section that gives them -- that
11 specifically gives them absolutely no remedies or no
12 cause of action -- and tying that in to saying, okay,
13 that is what we are suing under; we are suing under that
14 one section. Because in their reply brief, they all but
15 concede that they don't have any rights under the federal
16 statutes. They all but concede it and say, well, really,
17 what we are doing, even though we did not include it in
18 Count I, what we are really doing is we are suing under
19 1-248. Well, if you look at 1-248, there is nothing to
20 sue under there. It is, as I said, a simply introductory
21 paragraph and has nothing to -- it is no legal vehicle
22 for them to take a suit against us, or the Town of
23 Herndon, for that matter.

1 And if you think about their
2 interpretation of how 1-248 gets them to -- gives them
3 the standing that they need to file suit -- it comes up
4 with a totally ludicrous result. The ludicrous result is
5 that what they are saying, if you expound upon it, is
6 that any taxpayer or citizen in Fairfax County, any time
7 that they dislike the way that an expenditure has been
8 approved by the Board of Supervisors, or the Town, or the
9 City of Fairfax, they can file suit. Can you think of
10 the thousands of lawsuits that would be coming in --

11 THE COURT: Well, it has to be unlawful
12 activity as a result of it; right?

13 MS. LOCKETT: Well, all they have to do is
14 allege that it is unlawful. They have to say, well, we
15 think that this is going to lead to unlawful activity;
16 wherefore, we are going to file a lawsuit and we are
17 going to stop you. What they are doing is they are
18 putting themselves in policing mode. They are now
19 policing and making sure that everyone is following the
20 state and federal laws. Isn't that what the AG's office
21 is for? That is the job for federal prosecutors. That
22 is not the job for individual citizens to take on local
23 government every time they disagree with them or believe

1 that they are violating a statute. That is not the
2 legislative intent of that statute to enable every
3 citizen who has a gripe to haul a local government in
4 before you and have you decide whether or not we are
5 doing what we should be doing. Really, that is why there
6 is an AG's office; to make sure that state laws are
7 enforced. That is why there is a Commonwealth Attorney's
8 office; to make sure that crimes are prosecuted. That is
9 why there is an enormous federal government full of
10 prosecutors and lawyers; to ensure that their laws are
11 being followed. It is not specifically for individual
12 citizens.

13 In fact, what the citizens' remedies are
14 is the voting booth. The citizens' remedies for this
15 type of thing is go to the voting booth. And if you
16 don't like what your representative is doing for you, you
17 vote them out. That is why -- That is the way that the
18 law is set up, and that is why it is organized the way it
19 is. They do have a remedy, and the remedy is through the
20 political process, not through trying to enforce criminal
21 laws through the courts.

22 Now, on Count II, the Amended Complaint
23 alleges that the County is in violation of the newly

1 passed Code Section 63.2-503.1, which states that no
2 person who is not a United States citizen or legally
3 present in the United States shall receive state or local
4 public assistance pursuant to this Subtitle, except for
5 state or local public assistance that is mandated by
6 federal law pursuant to 8 USC 16-21.

7 THE COURT: That was an interesting
8 argument.

9 MS. LOCKETT: If you look at it --

10 THE COURT: It is very specific.

11 MS. LOCKETT: -- it is very specific.

12 Count II of the Complaint must fail because not only does
13 the statute -- has it not gone into effect yet -- aside
14 from the fact --

15 THE COURT: It is going to be in effect in
16 about, what, two weeks?

17 MS. LOCKETT: Right.

18 THE COURT: I don't know what the date is
19 on that.

20 MS. LOCKETT: Aside from the fact that at
21 the time of the filing of the Complaint and at the time
22 you are hearing this argument it is not in effect, it is
23 not going to apply to the day laborer program in any

1 case, because Fairfax County's actual spending authority
2 to fund and support the employment services, such as day
3 laborers, such as others in need of public assistance,
4 that authority that grants us the right to make this
5 expenditure is not found in the Subtitle 2 of 63.2-5031.
6 It is found in Subtitle 1 under Section 63.2-314. 314 is
7 not part of Subtitle 2. And if you read subtitle, there
8 is a reason they put S U B in there. It wasn't a typo.
9 It specifically says subtitle.

10 And the reason that we are arguing that it
11 is not a subtitle is the legislative history, which we
12 set forth in our brief, of this statute. It bears out
13 this narrow application. The statute was enacted just in
14 the last year -- the 2005 General Assembly -- and the
15 Acts were introduced as 2005 House Bill 1798 and 2005
16 Senate Bill 1141. If you look at the original
17 introduction of those bills, they are considerably
18 different and vastly broader than the two identical bills
19 that were actually enacted and that do go into effect
20 next month. This narrowing scope, the fact that it was
21 narrowed down to where it is, gives you some legislative
22 history and some intent from the legislature that really
23 they are there to restrict our expenditures under

1 Subtitle 2.

2 And, as I said, all of the power and
3 authority that we use to enact and to prove these
4 expenditures came under Subtitle 1, so it just doesn't
5 affect this program, in any case. So, we are asking that
6 you sustain our demurrer on that count. Even if we were
7 arguing this in February, I would have the same argument.
8 It just doesn't apply.

9 Now, on Count III, as we explained in
10 Count II, Fairfax County is specifically authorized to
11 receive and disburse funds to provide public assistance
12 for the purpose of aiding needy people pursuant to
13 Virginia Code Section 63.2-314. The Plaintiffs' sole
14 response to our demurrer -- or to our plea in bar on this
15 -- is that the statutory authority is implied, at best,
16 and that the statute does not address implementing the
17 funding. And, as such, they argue pursuant to Arlington
18 County v. White that Fairfax County needs to demonstrate
19 that the method of implementation of this funding or this
20 program must be reasonable, which would require a hearing
21 on the facts. It is argument that we don't even get to
22 that point, because the statute is rather specific about
23 how the funds -- what happens with the funding and how it

1 is to be implemented. So, we don't need to get to the
2 point of whether or not it must be done so responsibly,
3 because we don't get past step one, though I in no way
4 concede that we are not doing it reasonably. I don't
5 want you to get that impression.

6 The statute sets forth where the funding
7 can be received, from where, and how, either from public
8 grants or from a listed variety of private sources. It
9 also specifically sets out how the funds should be
10 distributed by authorizing a public body to make public
11 grants to respective public boards. The statute further
12 specifically sets out that eligibility for the aid is not
13 limited to that of public assistance programs in the
14 Commonwealth. So, due to the fact that there are so many
15 specific restrictions and explanations as to how that
16 money should come in, where it should sit, where it
17 should be funded, and who it should be funded to, we
18 don't get to the reasonableness argument, because it is a
19 specific grant of authority to us to grant that money.
20 So, we are asking that it be sustained on that count, as
21 well.

22 I would be happy to answer any questions
23 that you have.

1 THE COURT: Thank you. Mr. Hurd?

2 MR. HURD: May it please the Court.

3 America is a nation of immigrants, but America is also a
4 nation of laws. What is at issue here is whether
5 America's laws on immigration are being flouted by the
6 Town of Herndon and the County of Fairfax.

7 They have filed their demurrers and they
8 have filed their pleas in bar, but nowhere in those
9 pleadings do they say that the Complaint fails to state a
10 violation by them of federal immigration law. That is
11 the allegation. They failed to say the Complaint states
12 one.

13 What they say is that the taxpayers do not
14 have standing; that they cannot come to court and do
15 anything about it. But nowhere do they deny in their
16 pleadings that they are violating federal immigration
17 law, nowhere do they say in their pleadings that the
18 Complaint falls short in that regard, and that is an
19 extremely important point that runs throughout the
20 argument this morning.

21 They say that these taxpayers do not have
22 standing to complain about the alleged violation of
23 federal law, but that argument is based on at least two

1 basic mistakes. The first mistake they make is that they
2 confuse the rules on taxpayer standing. Many of the
3 cases they cite deal with challenging the actions of
4 state government, and we agree that there standing is
5 limited. The Supreme Court said so in the Goldman case.
6 But in the Goldman case the Supreme Court also said that
7 a different set of rules apply when local taxpayers
8 challenge the actions of local government.

9 If I may, Your Honor, hand up a copy of
10 Goldman. The key passages, Your Honor, on page 372, the
11 right of taxpayers to challenge the legality of
12 expenditures by local governments is a right permitted in
13 almost every state, the Court said. This right is
14 premised on the particular relationship of the taxpayer
15 to the local government that makes the taxpayer's
16 interest in the application of revenues direct and
17 immediate. The same conclusion does not apply for
18 federal and state taxpayers. Thus, the Court went on
19 that a citizen or a taxpayer may challenge the legality
20 of certain actions of local government and its
21 expenditures, because the interest of a citizen in
22 matters of local government is direct and immediate,
23 rather than remote and minute. And, finally, another

1 passage, the direct and immediate interest of the citizen
2 in the operation of local government, whether based on
3 issues arising from a local election or a local
4 government's exercise of its fiscal authority, permits
5 these citizen or taxpayer challenges.

6 Now, opposing counsel said something that
7 I found a little unusual; that there was no allegation of
8 taxes being paid. But the Complaint makes it very clear
9 we allege these are taxpayers of Herndon. If they are
10 taxpayers, they are paying taxes.

11 THE COURT: I thought he said that there
12 was no allegation that expenditures were being made.

13 MR. HURD: He made that allegation in his
14 argument, as well, Your Honor, and that, too, is
15 fallacious for reasons that I will go into in a moment.

16 He also said there was no actual
17 antagonistic assertion and denial of right. Those words
18 do not appear in that order in the Complaint, but those
19 are not magic words that must appear in the Complaint in
20 order to invoke the declaratory judgment statute.
21 Instead, as the Supreme Court said in the City of Fairfax
22 versus Shanklin, a case which actually they cite, it must
23 appear that there is an actual controversy existing

1 between the parties based upon an actual antagonistic
2 assertion and denial of right.

3 Herndon asserts that they may give this
4 land rent-free to this group for two years. The
5 taxpayers deny it, an assertion of denial of right.
6 Fairfax asserts they can appropriate this money. The
7 taxpayers deny it, again, an assertion and denial of
8 right.

9 THE COURT: You have to admit it is a much
10 broader statement than the usual case that comes up where
11 someone is directly aggrieved by some particular state
12 action.

13 MR. HURD: Your Honor --

14 THE COURT: You have to address that
15 point. It is a much different --

16 MR. HURD: That is, Your Honor, my next
17 point. And this is the second mistake they make. They
18 approach this case -- they want the Court to approach
19 this case -- as if the only action at issue here were a
20 zoning decision.

21 THE COURT: Yes.

22 MR. HURD: But that is not the case.
23 Fairfax clearly is not a zoning decision. They are

1 spending money. And the action by Herndon is tantamount
2 to the same thing. Here Herndon did not act to zone
3 somebody else's land. They did not give a special use
4 permit for some private land. What Herndon did was to
5 take real estate belonging to the Town, real estate
6 bought with taxpayer money, and turn it over to a private
7 group rent-free for a period of two years. That is the
8 expenditure of the public resource.

9 They cite a case, Your Honor, of Stockman
10 v. Loudoun where the Plaintiff was denied standing to
11 challenge a zoning decision. But there the Court
12 recognized the very distinction that opposing counsel
13 wants this Court to ignore. In denying standing in that
14 case the Court said that the case, quote, the rezoning of
15 a tract of land privately owned and expenditures of
16 private funds. It does not challenge the use of public
17 property or revenues.

18 THE COURT: I'm sorry. I missed it when
19 you said the case. Which case is that?

20 MR. HURD: It is Stockman v. Loudoun. It
21 is one of the cases cited by opposing counsel in footnote
22 --

23 THE COURT: I believe I have it in my

1 pile. That's fine.

2 MR. HURD: Thank you, Your Honor. So,
3 that case recognizes the distinction between a normal
4 zoning action where the Town is affecting the ability of
5 a private party to use private land in a certain way, and
6 this case where they are giving an interest in the land
7 of public property -- an interest in public property --
8 to this group for a period of two years. In fact, what
9 is most interesting about their argument is that it
10 directly contradicts the argument that they make -- that
11 Herndon makes -- in its reply brief. In their reply
12 brief, Page 4 of their reply memo -- this is the 314
13 statute that they have both referred to -- they argue
14 that this gift of taxpayer resources is tantamount to the
15 disbursement of public funds, which is what that statute
16 authorizes.

17 So, it seems they are hoisted by their own
18 petard admitting, in effect, that when you give the
19 private group public resources to use for two years it is
20 the kind of action that is subject to challenge by
21 taxpayers. Whether it is cash or land, whether the land
22 is given away for two years or twenty years or fee simple
23 absolute, it is still subject to challenge by the

1 taxpayers.

2 Now, they also say that there is no
3 federal cause of action here, but that really entirely
4 misses the point. We are not bringing a federal cause of
5 action. We are bringing a taxpayer cause of action, as
6 we have the right to do under state law, alleging that
7 the actions of these local governments are unlawful.

8 And let me digress for a moment, Your
9 Honor, to make it clear that we are not simply alleging
10 that the actions by Herndon and Fairfax may or could lead
11 to violation of federal law by others. We are alleging
12 that the acts of Herndon and Fairfax are in violation of
13 federal law, because it is done in order to facilitate
14 the unlawful hiring of illegal aliens, contrary to
15 federal law. And they do not anywhere in their pleadings
16 contend that we have failed to make out a case for their
17 violating federal law.

18 Let me move on. We know from Goldman that
19 taxpayers are entitled to challenge the unlawfulness of
20 expenditures of money or sources by local governments.
21 The Supreme Court has not placed any limit on the sort of
22 unlawfulness by a locality that taxpayers may bring
23 forward as a reason for overturning that illegal action.

1 They want you to adopt the rule that says that if the
2 action by the locality is unlawful because it violates
3 federal law, then the taxpayers can do nothing about it.
4 Federal law is supposed to be the supreme law of the
5 land, and they are taking that principle and turning it
6 on its head.

7 It is not, of course, as we do allege in
8 our brief -- and it is not new in our reply brief, it is
9 actually in the Complaint -- Paragraph 34 we point out
10 that under Virginia Code Section 1-248 the Virginia
11 General Assembly has given localities specific
12 instructions; obey the federal law. This is not some
13 generic introductory language. It uses the mandatory
14 word "shall". It says that the Constitution and laws of
15 the United States shall be supreme and that any
16 ordinance, resolution, bylaw, rule, regulation, or order
17 of any governing body -- and that includes them -- shall
18 not be inconsistent with the Constitution and laws of the
19 United States.

20 Here the problem is that the actions taken
21 by the governing bodies of Herndon and Fairfax are
22 inconsistent with the laws of the United States and they
23 are also, therefore, unlawful as a matter of Virginia law

1 by virtue of that statute, and these taxpayers have
2 standing to challenge that action.

3 So, in sum, we have two things. First, we
4 have a case where taxpayers have standing to challenge
5 the actions of their local government as unlawful, they
6 have standing to challenge the appropriation of money,
7 they have standing to challenge the donation of public
8 resources by the Town of Herndon. Second, we have an
9 allegation that this appropriation and this donation
10 violate federal law. And at this stage of the
11 proceeding, given their demurrer and plea in bar, reading
12 them very carefully, nothing in there challenges the
13 sufficiency of the allegation that they are in violation
14 of federal law. Surely, this is enough to overrule the
15 plea in bar, require them to file an answer, and let the
16 case proceed.

17 Before I sit down, let me address briefly
18 the allegation that Count III and IV are conclusory in
19 nature. They are not. They incorporate all of the
20 allegations about the violations of federal law, all the
21 allegations about the violations of the Virginia Welfare
22 Statute, and all those facts are laid out.

23 I do agree with Ms. Lockett on one point.

1 Count III, ultra vires, she said that whether the method
2 of discharging their duty is reasonable would require a
3 hearing on the facts. Fine. Let's have a hearing on the
4 facts, Your Honor. Overrule the demurrer and let's
5 proceed to the merits of the case.

6 It is ultra vires because it is
7 unreasonable? Given the way they did it, it is ultra
8 vires because it violates federal law; therefore, it is
9 per se unreasonable. And the same thing is true with the
10 arbitrary and capricious language of Count IV.

11 Let me turn, finally, to Count II. It is
12 the Virginia Welfare Statute count on which they raise
13 some additional points. They say that suit cannot be
14 brought because the law is not yet in effect. But
15 lawsuits are brought all the time before --

16 THE COURT: Let me ask you a question
17 before you get to that. If the Town of Herndon's
18 emphasis is always to make this a narrow case of them
19 granting a permit, then there was nothing wrong with the
20 way they granted the permit. Under ordinary
21 circumstances, that is probably true; right? I'm not
22 trying to get into a semantic argument. But, I mean, if
23 there wasn't this issue of unlawful undocumented workers

1 using the site, we wouldn't have a case here.

2 MR. HURD: Your Honor, there are two
3 things -- and that is one of them -- that make this case
4 stand out from the normal conditional use permit case.
5 One is that they are not granting a permit for some
6 private person to use his or her land in a particular
7 way. They are, in essence, smuggling a lease into the
8 guise of the conditional use permit and giving possession
9 of the land, control of the land, to be used by this
10 group. That is not a normal kind of zoning decision, not
11 a normal kind of conditional use permit decision.

12 And what makes it reasonable, what makes
13 arbitrary, what makes it ultra vires, what makes it
14 illegal, is that it is being done in violation of federal
15 law. It is being done with the purpose to aid and abet
16 the violations of federal immigration law. That is the
17 purpose of it being done. That is what we allege and we
18 should have a chance to prove that.

19 THE COURT: I'm going to ask you what
20 appears to be an obvious question. If the County of
21 Fairfax and Town of Herndon built a recreation center,
22 which they always do, and maybe they lease it to somebody
23 else, or whatever they do -- I mean, I've had a case in

1 this Court where they have made a special deal with the
2 YMCA in Reston and they built a particular youth center,
3 and there was some confusion about -- some legal contest
4 about that. But the thing that gets you angry, or that
5 makes this case different, is that that facility is used
6 for some unlawful purpose.

7 MR. HURD: That's correct, Your Honor.

8 THE COURT: I mean, isn't that true?

9 MR. HURD: That's correct. It is being
10 used for some unlawful purpose. And here the action
11 being taken by the Town is being taken with the knowledge
12 and with the purpose of facilitating --

13 THE COURT: So, it is a little bit
14 different than that. You are saying that they
15 deliberately did this with the knowledge that it was
16 going to be used for an unlawful purpose?

17 MR. HURD: Absolutely, Your Honor. That
18 is part of why they did it, because they believe that
19 these services ought be provided on Town property to
20 those who are not lawfully present. And that, for better
21 or worse, is a violation of federal immigration laws.

22 THE COURT: So, if the fact that it was
23 used for an unlawful purpose was accidental, then your

1 case would be different?

2 MR. HURD: It would be different, Your
3 Honor. If the unlawfulness were accidental, if the
4 unlawfulness perhaps were even incidental, it would be a
5 different case. But here it is purposeful and it is the
6 predominant purpose of the day laborer site.

7 Your Honor, on Count II, lawsuits are
8 often brought to challenge a law before the law goes into
9 effect, and this is just the other side of the same coin.
10 Opposing counsel said he knew of no statute that --
11 excuse me -- knew of no case where that had been done.
12 We cited one in our brief, Richmond Medical Center v.
13 Gilmore. It is one of a standard, garden variety type
14 constitutional challenge where if you think the law is
15 inappropriate, you challenge it before it goes into
16 effect. They had misunderstood that precedent. The
17 point there was not that the doctors were allowed to
18 bring the charge before they were prosecuted. The point
19 is the doctors were allowed to bring the challenge
20 against the law before the law went into effect. There
21 is nothing unusual about that. It happens all the time.
22 This is the flip side of that.

23 THE COURT: It is kind of moot anyway;

1 isn't it?

2 MR. HURD: I think so, Your Honor.

3 THE COURT: I mean, at this point. If I
4 gave you 21 days to amend your Complaint, or something,
5 we would be over the new year.

6 MR. HURD: Your Honor, I think that is
7 exactly right.

8 THE COURT: I think Ms. Lockett's argument
9 about Title I and Title II is more interesting.

10 MR. HURD: Well, it was interesting
11 argument, but let's look at that statute. The statute
12 authorizes local boards to disburse funds for the purpose
13 of aiding any persons within their respective counties,
14 cities or districts. By the way, it does not say towns;
15 it says counties and cities. So, I don't know insofar as
16 Herndon is trying to grab hold of that statute, as they
17 did in their reply brief, if they have the ability to do
18 so.

19 But beyond that, the statute does not say
20 this applies to Herndon and Fairfax. The statute does
21 not say that the aid may be given to needy persons
22 anywhere and everywhere. It places a jurisdictional
23 limit. It says, quote, needy persons within their

1 respective counties, cities and districts, end quote.

2 Now, this particular day laborer site is
3 smack dab on the County line. It is set up to serve
4 people wherever they may come from, not just those who
5 come from within the County of Fairfax. More to the
6 point, when the law says needy persons within the County,
7 surely it means -- surely they meant -- any persons who
8 are lawfully within the County. Surely when the Assembly
9 meant to authorize services to people who are within the
10 County, it did not mean to authorize services to
11 subsidize unlawful conduct.

12 And when you read Section 314 this way, it
13 harmonizes perfectly with section 503.1, which says quite
14 explicitly that employment services cannot be provided to
15 persons who are in the country unlawfully. So, demurrer
16 to Count II should also be overruled.

17 THE COURT: So, you are saying that
18 despite the fact that the provision says it applies only
19 to Title II that you think it reasonably also applies to
20 Title I because the lawful is presumed?

21 MR. HURD: As I understand their argument
22 they said, okay, you say 503.1 but we've got this
23 loophole -- they don't use that word, but that is what it

1 is -- that is what they allege it is -- it is a loophole,
2 they say, and we can proceed under this and not worry
3 about 503.1. My argument is that if you look at those
4 words and you try to harmonize those words in that
5 statute with the statute that we allege, the only way to
6 harmonize it is to take the words "within the County" and
7 to construe them to mean lawfully within the County. And
8 if you limit resources to those who are lawfully within
9 the County, then you are not able to justify under 314
10 the appropriation by Fairfax.

11 Moreover, Your Honor, there is another
12 reason why 314 does not give them the loophole. And that
13 is no matter how you read these two statutes, 314 and
14 503.1 together, 314, the one they cite, is surely trumped
15 by federal law.

16 THE COURT: That is the statute you cited;
17 isn't it?

18 MR. HURD: I'm sorry?

19 THE COURT: The statute that you relied
20 upon is the statute they are talking about; right? The
21 special statute that goes into effect January 1st?

22 MR. HURD: We cite 503.1. That is the
23 January 1st statute. They cite 314, which they present

1 as kind of a loophole to 503.1. 314 is the older
2 statute. 503.1 is the newer statute. So, even if we
3 didn't have 503.1 and a need to reconcile the two, we
4 would still have the fact that federal law trumps state
5 law where it says do not provide welfare benefits to
6 those who are not here lawfully.

7 Before I sit down, Your Honor, I would
8 like to underscore three points. One is that the
9 Defendants have not denied that the Complaint
10 sufficiently alleges a violation of federal immigration
11 law by Herndon and Fairfax. They may say it when they
12 stand up here again, but it is not in the demurrer, it is
13 not in the plea in bar, and it is those pleadings that
14 are before the Court this morning.

15 Secondly, this is an issue, obviously, on
16 which there are strong feelings on both sides. And it is
17 precisely this sort of case where there is the greatest
18 need for the rule of law. These taxpayers believe their
19 local governments were violating the law and have come to
20 this Court for a ruling on that question. The Defendants
21 do not want a ruling on the merits. They want you to
22 turn these taxpayers away at the threshold. The Supreme
23 Court has made it clear, we believe, that they have

1 standing. But if there is any doubt in the Court's mind
2 of that question, then dismissing this case would be
3 premature. The case should be allowed to go forward.

4 Finally, Herndon and Fairfax suggest that
5 they have no authority to enforce immigration law. We
6 don't necessarily agree with that. But whether or not
7 they have authority to enforce the law, they certainly
8 have no authority to flaunt it. That is why we are here.
9 We ask the demurrers and pleas in bar be overruled and
10 the case be allowed to move forward.

11 THE COURT: Thank you. I guess you have
12 the last word.

13 MR. DUDLEY: Thank you.

14 THE COURT: You don't need to go as long
15 as you did.

16 MR. DUDLEY: I certainly will not, Your
17 Honor, to the great relief to those in attendance.

18 THE COURT: The last word is usually kind
19 of --

20 MR. DUDLEY: I understand, Your Honor. I
21 hope by now that I've learned the meaning of rebuttal, as
22 well. I will shrink and try only to rebut.

23 The issue of authority to do what we did,

1 the brief mentions 15.2-2286 which, of course, is the
2 express authority for this kind of legislative action,
3 including the granting of a CUP as here. 15.2-2280 gives
4 us the right to decide what to do with our property. Mr.
5 Hurd said his pleading doesn't use the magic words of
6 actual antagonistic assertion, et cetera. He is right.
7 And I'm sure there is a reason for that, but that isn't
8 really the point. Under the cases there does have to be
9 an actual controversy between these parties. You can't
10 just say I live here and I'm unhappy with what you are
11 doing.

12 It is interesting that he would direct the
13 Court to Stockman, decided in Loudoun County. I would
14 note for Your Honor the Court there adopted in toto the
15 argument I am making. It said, Mr. Stockman, you cannot
16 proceed because you haven't alleged any facts sufficient
17 to give you standing. The demurrer is sustained.

18 Likewise, Your Honor, in talking about
19 Goldman, I would suggest, with all due respect to Mr.
20 Hurd, he referred you to page 372, but it is very
21 interesting to see what the cases that that case talked
22 about were dealing with and how they are so very
23 different from this one. He just said, trust me,

1 taxpayers can proceed with this kind of case. Well, here
2 is what the Court was talking about, expenditures made by
3 a County Board to finance allegedly unauthorized travel,
4 issuance of local government bonds to finance a sanitary
5 district, lending government funds to build a facility in
6 connection with the construction of an airport, and,
7 finally, another case of the alleged issuance of illegal
8 bonds to finance something or other. It really points
9 out this critical difference in the cases on the standing
10 point.

11 The point we are making about the
12 conclusory allegations issue which you asked Mr. Hurd
13 about, I think he affirmed the point we are making.
14 Because when you asked him to tell you what the facts
15 were, here is what he did. He said, wait a minute, we
16 have referred to and incorporated -- and then I hope with
17 all due respect you caught what he said -- he said we
18 have incorporated all of the allegations of the federal
19 law violation. Okay? So, I think the correct word is
20 tautological -- I'm not an English teacher -- but it is
21 certainly circular. He just says we keep pointing to the
22 federal statutes, and that is enough. That's very
23 different from I'm Plaintiff A, here is where I live,

1 here is how I've been hurt, it is my property. And that
2 point, Your Honor, is exactly what was addressed in the
3 Brunswick case, and I didn't hear anything about the
4 Court sustaining the demurrer there and dismissing
5 because it is only a conclusory allegation.

6 And, finally, Your Honor, they have
7 referred to and attached the resolution by which the CUP
8 was granted. I want the Court to be sure to know that in
9 paragraph Q of that action by the Town of Herndon the
10 resolution says all activities shall be carried on in a
11 lawful manner as determined by the appropriate
12 authorities.

13 Now, wouldn't it be strange if the Town
14 were now subject to a lawsuit because of their theory
15 when, in fact, the action taken by the Town on which they
16 rely says it must be lawful, and that is a condition of
17 the permit that we give you. It is just too bizarre for
18 explanation, Your Honor. They can't make that link
19 between not only we have the right to do this kind of
20 thing, but when we did it we said and we addressed their
21 point.

22 THE COURT: He was very clear in his
23 argument that he thought the Town of Herndon had acted

1 purposefully and with knowledge that federal laws were
2 going to be broken at the center. Would you agree with
3 me?

4 MR. DUDLEY: I think that is certainly --

5 THE COURT: And you are saying the Town of
6 Herndon in the resolution said that they were only
7 contemplating lawful activities going on at the center?

8 MR. DUDLEY: I look at this way, Your
9 Honor --

10 THE COURT: Is that kind of pushing the --
11 I mean, who is going to determine whether the activities
12 are lawful, or not?

13 MR. DUDLEY: I think Ms. Lockett --

14 THE COURT: I may be asking you something
15 you think is too far along in the case, but --

16 MR. DUDLEY: Well, I think this, Your
17 Honor. I don't hear anything from the Plaintiffs about
18 whether they have a private cause of action to enforce
19 the immigration laws. Certainly, they don't as to the
20 federal statutes. They don't even talk about that in
21 their brief. They just ask you to say that's not really
22 what our case is about. That is a given. They don't
23 have that authority, nor does the Town. And you can

1 create any number of examples, whether it was federal
2 taxation, or something else that is uniquely committed to
3 the federal government, you know, they would like to
4 overlook that point.

5 Now, do federal officials and those who
6 are granted the authority to deal with alleged violations
7 of immigration law have such authority? Yes, they do.
8 And that, in fact, draws the right line between a town
9 which says this nonprofit may use this property. That's
10 all we are doing. And, by the way, because this is a
11 conditional use permit, the condition Q speaks to the
12 issue that the Plaintiffs would like to complain about.
13 So, in doing it, we dealt with the problem they say we
14 have. We don't have a problem.

15 Thank Your Honor.

16 THE COURT: Did you want to say something?

17 MS. LOCKETT: I do. I'll be very, very
18 brief, I assure you.

19 Three quick points. The first is
20 Plaintiffs make -- spent quite a bit of time indicating
21 to you that we never denied factual allegations that were
22 set forth in the Bill of Complaint. Well, of course, we
23 didn't. This is a demurrer. We are not here to debate

1 whether or not factual allegations are true, or not. We
2 are here to debate whether or not the pleadings rise to
3 the standard that they need to rise to in order for them
4 to move forward with a cause of action.

5 So, I would ask you to disregard any
6 arguments on that line because, obviously, we didn't make
7 denials of any factual allegations. That is not the
8 purpose that we are here for today.

9 I'm going to argue, too, that Plaintiffs
10 take a pretty big leap here from the allegations that are
11 set forth in the 60-some paragraphs of their Amended Bill
12 of Complaint to the fact that Fairfax County is knowingly
13 providing services in violation -- or funding services in
14 violation -- of federal immigration laws. Really, that
15 is quite a big leap for them to go from the allegations
16 they've set forth in the Complaint to their conclusions
17 today that Fairfax County is knowingly funding illegal --
18 violations of illegal immigration laws. There is no way
19 they can get from point A to point B.

20 What they have alleged is that we have
21 funded a nonprofit to provide services to the needy --
22 i.e. employment services to the needy -- at a site that
23 is set up in the Town of Herndon. We did.

1 Appropriations went out -- I think some \$170,000, as per
2 their Complaint -- to Project Hope and Harmony, a
3 nonprofit, who is providing these services. They are
4 assuming that those services are going to go to illegal
5 immigrants. There is no factual basis for that. They
6 are just assuming it.

7 Now, the Bill of Complaint sets forth that
8 a study was done in Fairfax County that some percentage
9 of workers were undocumented. It is out there. That was
10 the study. It doesn't -- Without stretching it too far,
11 it doesn't show why they are undocumented, it doesn't
12 show what the documentation issues are, it doesn't show -
13 - that study doesn't get there -- get to that point from
14 where we are. It simply says some of the workers are
15 undocumented and this is an issue.

16 But they can't tie a study that was done
17 two years ago on whether or not some workers were
18 documented to the fact that Fairfax County intentionally
19 is violating any federal laws. Are workers who are
20 undocumented getting services at this site? Who know?
21 They could be, they could not be, but we are not
22 intentionally violating any laws. And I think it is a
23 big stretch to get from the pleadings the way that they

1 are written in the Amended Bill of Complaint to that
2 argument.

3 On Count II --

4 THE COURT: Are we going to go through all
5 your argument again?

6 MS. LOCKETT: No, just this one little
7 point.

8 THE COURT: Okay.

9 MS. LOCKETT: They assume that we should
10 all assume in Count II that the word lawfully would be in
11 there. Well, if you assume that the word lawfully should
12 be written in, then there really is no need for 63.1-
13 5031; is there? Because if we are going to assume that
14 all the services are only going to be lawful, then they
15 didn't need to pass the statute in the first place, and I
16 just wanted to point that out.

17 THE COURT: Thank you. I'm going to take
18 the matter under advisement and write an opinion,
19 hopefully in the not too distant future.

20 (Whereupon, at approximately 1:20 o'clock,
21 p.m., the hearing in the above-entitled matter was
22 concluded.)

23

