VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF FAIRFAX

KRISH KARUNAKARAM, *et al.*

Plaintiffs,

v.

Chancery No. 2005 4013

TOWN OF HERNDON and
COUNTY OF FAIRFAX, VIRGINIA

Defendants.

PLAINTIFFS' SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO DEFENDANTS' DEMURRERS

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TABLE OF CONTENTS

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Pursuant to this Court's February 10, 2006 letter, Plaintiffs, by counsel, respectfully submit their memorandum in opposition to Defendant County of Fairfax's ("County's") and Defendant Town of Herndon's ("Town's") supplemental briefs filed on February 27, 2006.[1]

I. INTRODUCTION AND SUMMARY.

A. Count I.

In their original briefs, Defendants' only arguments advanced in support of their demurrer to Count I of the Amended Bill of Complaint ("Amended Complaint")[2] were that Plaintiffs lacked standing and the federal immigration laws did not create a private right of action. These arguments have been rejected by this Court. Defendants did not argue that the facts alleged in Count I are insufficient to properly plead a violation of federal law and Virginia law. For this reason, Defendants' demurrer to Count I should fail as a matter of law.

Having been given a second bite at the apple, Defendants still have failed to make their case. Count I alleges that Defendants have used taxpayer resources to establish and support the Herndon day laborer site ("Site") for the express purpose of helping undocumented workers (*i.e.*,

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[1] The Court's letter to counsel requested briefs discussing whether Count I (against the Town and County) and Count IV (against the Town) allege actions that violate federal or Virginia law. *See* letter dated February 10, 2006 to counsel for the parties from the Honorable Kathleen H. MacKay, p. 3, attached as Exhibit 1. The Town took the opportunity to address Count II, as well as Counts I and IV. The County addressed only Count I.

[2] All references to any "Count" herein shall refer to Plaintiffs' Amended Complaint.

illegal aliens), to obtain employment in violation of federal law and Virginia law. The Site operator, Project Hope & Harmony ("PH&H"), provides employment services to illegal aliens to help them obtain unlawful employment. Defendants knew the Site would serve illegal aliens because the County had conducted a day laborer survey ("Survey") in the Fall of 2003 showing that more than 72% of the day laborers at County day labor sites were illegal aliens. Even though Defendants could have ensured that no illegal hiring would take place at the Site by simply requiring PH&H to screen the day laborers to exclude illegal aliens, Defendants chose not to require screening. After all, if more than 72% of the day laborers using the Site are illegal aliens, requiring PH&H to screen them would defeat the purpose of the Site. Defendants knew that hiring of illegal aliens would occur at the Site, and they enabled and supported it in violation of the federal statutes and Virginia Code § 1-248, as set forth in Count I.

Even if the Defendants' actions were not, in themselves, direct violations of federal law, those actions still would violate Virginia Code §1-248 because those actions have the natural – indeed, intended – consequence of encouraging and facilitating actions by others that violate federal law, and because they "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 152 (1982).

B. Count II.

In its original brief filed in support of its demurrer to Count II, the Town argued that Count II should be dismissed solely because Virginia Code § 63.2-503.1 had not yet taken effect when this suit was filed. As this Court has rejected that argument because the offenses alleged are ongoing (*See* Ex. 1, p. 4), the Town's demurrer to Count II should be denied.

Recognizing that its lone argument as to Count II has been rejected by this Court, the Town now belatedly raises a new argument in its supplemental brief. The gist of its new argument is that "employment services" are not "public assistance" within the meaning of

Virginia Code § 63.2-503.1. This argument lacks merit because the definition of "public assistance" for purposes of Title 63.2 (including Subtitle II) expressly includes employment services. Furthermore, the Town's argument incorrectly assumes that the Virginia legislature intended to allow illegal aliens to receive employment services to help them obtain employment even though that would violate Virginia Code § 1-248. The employment services provided to illegal aliens at the Site also are "public assistance" because they are provided on municipal property and are funded by Defendants. Thus, the Town's demurrer to Count II must be denied.

C. Count IV.

Count IV alleges that the Town's use of taxpayer property to establish the Site constitutes an arbitrary, capricious and unreasonable act for each of the following independent reasons. First, the Town gave PH&H the rent-free use of taxpayer property to establish the Site knowing it would provide employment services to illegal aliens to help them obtain employment in violation of federal law, Virginia Code § 1-248, Virginia Code § 63.2-503.1, and Herndon zoning ordinance § 78-107(11). Second, even if the Town's actions were not, in themselves, direct violations of federal law, those actions still would be unreasonable because they have the natural – indeed, intended – consequence of encouraging and facilitating actions by others that violate federal law, and because they "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *De La Cuesta*, 458 U.S. at 152. Because the Town's alleged actions are an unreasonable method of discharging any powers it may have, the Town has no authority to engage in them. *See Arlington County v. White*, 259 Va. 708, 712, 528 S.E.2d 706, 708 (2000). Thus, the Town's demurrer to Count IV must be denied.

II. APPLICABLE LEGAL STANDARD.

Defendants' demurrers test the legal sufficiency of the allegations pleaded in the Amended Complaint. It is well established under Virginia law that a demurrer admits the truth of all material facts alleged in the complaint, all facts impliedly alleged, and all reasonable inferences that can be drawn from the facts alleged. *Riverview Farm Assocs. Va. Gen. P'ship v. Board of Supervisors*, 259 Va. 419, 427, 528 S.E.2d 99, 103 (2000). Indeed, "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove *no set of facts* in support of his claim which would entitle him to relief." *NRC Mgmt. Servs. Corp. v. First Va. Bank - Southwest*, 63 Va. Cir. 68, 70 (Cir. Ct. City of Roanoke 2003)(explaining that Virginia standard for a demurrer is "identical" to federal standard for a motion to dismiss under Fed. R. Civ. P. 12(b)(6), and quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957))(emphasis added). "The trial court is not permitted on demurrer to evaluate and decide the merits of the allegations set forth in a bill of complaint, but only may determine whether the factual allegations of the bill of complaint are sufficient to state a cause of action." *Riverview Farm Assocs. Va. Gen. P'ship*, 259 Va. at 427, 528 S.E.2d at 103. Facts outside the complaint asserted by any party may not be considered by the court in ruling on a demurrer.[3] *See Lister v. Virginia Nat. Bank*, 209 Va. 739, 167 S.E.2d 346 (1969). Accordingly, for purposes of Defendants' demurrers, this Court must accept as true all facts expressly or impliedly alleged in the Amended Complaint, must construe in Plaintiffs' favor all reasonable inferences that can be drawn from those facts, and must disregard the Town's improper assertions of facts outside the

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[3] For example, in the section entitled "Argument" on pages 5-6 of its supplemental brief, the Town improperly attempts to bootstrap its demurrer with extraneous, asserted facts that are outside the Amended Complaint. *See* Town Brief, pp. 5-6. Of course, such asserted facts pertaining to other day labor sites in other states have no bearing on whether Defendants' actions violate federal law or Virginia law in this case. This Court may not consider these improper assertions of fact by the Town. *See Lister v. Virginia Nat. Bank*, 209 Va. 739, 167 S.E.2d 346 (1969).

Amended Complaint.

III. COUNT I PROPERLY STATES A CAUSE OF ACTION FOR VIOLATION OF FEDERAL AND VIRGINIA LAW.

A. Facts Alleged in Count I of the Amended Complaint.

Count I alleges that Defendants used taxpayer property and funds ("taxpayer resources") to establish and support the Site.[4] *See* Amended Complaint, ¶¶ 14-17, 29-30. The stated purpose of the Site is to provide an "assembly site where day laborers can congregate for the purpose of finding work." *Id.* at ¶ 18 (emphasis added). The application for the Site and the "Operating Policy and Procedures" indicate that the Site is intended to assist undocumented workers, *i.e.*, illegal aliens, who are not eligible to work in this country. *Id.* at ¶ 23.

At the time the Town Council approved the application to establish the Site on taxpayer property and the County authorized the expenditure of taxpayer funds to support the Site, Defendants knew a County Survey taken in the Fall of 2003 showed that more than 72% of the workers at day laborer sites in the County could not secure permanent employment because they were not authorized to work in the United States. *Id.* at ¶¶ 24, 25, 32. The Survey demonstrates a strong likelihood that a substantial majority of the day laborers who would use the Site would be illegal aliens, who are not eligible to work in the United States. *Id.* at ¶ 24. Thus, Defendants knew that an overwhelming majority – likely, more than 72% -- of the day laborers at the Site would not be eligible to work in the United States and that the purpose of the Site was to help

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[4] The Amended Complaint alleges that the Town has provided the rent-free use of taxpayer-owned real property as the location for the Site. *See* Amended Complaint, ¶ 16. The Amended Complaint alleges that the County authorized the expenditure of approximately $400,000 to support day laborer sites in the County, including approximately $170,000 for the Site. *Id.* at ¶¶ 29, 30. The Town disputes the allegation that PH&H was given rent-free use of the Town property by improperly referring to a purported license agreement that is not before this Court. *See* Town Brief, p. 3, n.3. The conditional use permit granted to PH&H does not require the payment of rent and makes no reference to any purported license agreement. A reasonable inference may be drawn that payment of rent by PH&H was not required. Facts outside the Amended Complaint may not be considered by this Court in ruling on the Town's demurrer. *See Lister v. Virginia Nat. Bank*, 209 Va. 739, 167 S.E.2d 346 (1969). Thus, this Court may not consider the Town's bald assertion of a license agreement.

these illegal aliens obtain employment in violation of federal law.

At all relevant times, Defendants also knew that, in furtherance of the stated purpose of helping illegal day laborers find employment, the Site operator, Project Hope & Harmony ("PH&H"), would provide employment services to all day laborers using the Site, including the more-than-72% that would not be eligible to work in the United States.[5] *Id.* at ¶ 21, 22, 28. These employment services would include matching employers with laborers according to the laborers' respective skill sets, job training, language and literacy classes, job development, and workers' rights and immigration law assistance. *Id.* Furthermore, Defendants knew PH&H would not screen persons seeking employment at the Site to exclude illegal aliens. *Id.* at ¶ 28. Because the stated purpose of the Site is to help illegal day laborers find work (*id.* at ¶¶ 18, 21, 23), a reasonable inference can be drawn that employment services would be provided to illegal aliens to help them obtain work, notwithstanding that they are ineligible to work in this country.

Even though Virginia Code § 1-248 obligated Defendants to act in a manner consistent with federal law and the Town could have prevented the illegal hiring of illegal aliens at the Site and ensured compliance with federal law by simply requiring PH&H to screen the day laborers using the Site, the Town declined to take such prophylactic action. *Id.* at ¶¶ 28, 33. Instead, because the purpose of the Site was to help illegal aliens obtain employment, the Town took action that would not prevent illegal hiring at the site and only facially required PH&H to "inform" prospective employers that it was illegal to hire illegal aliens, thus leaving it to prospective employers to incur the minimal risk of violating unenforced federal immigration laws in order to hire cheap day labor. *Id.* at ¶ 27. A reasonable inference from these facts is that

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[5] The Town's argument that Plaintiffs have not alleged that such services were provided to illegal aliens is erroneous and ignores paragraphs 21 through 25 of the Amended Complaint and the reasonable inferences therefrom. *See* Town Brief, p. 4.

Defendants permitted PH&H to provide employment services to illegal aliens at the Site with the expectation that they would be hired in violation of federal law. *Id.* ¶¶ 18, 21, 22, 27. In fact, this was clear to the members of the Town Council who opposed the approval of the Site application, as they publicly stated at the Town Council meeting that using taxpayer property to establish the Site under these circumstances was an endorsement of illegal immigration. *Id.* ¶ 26. This underscores that the Town was put on notice that its actions would violate federal immigration laws and that its representatives had the requisite intent to violate the federal immigration laws. *Id.*

B. The Facts Alleged in Count I and the Reasonable Inferences Therefrom Are Legally Sufficient to Plead Violations of Federal Law and Virginia Law.

1. Virginia Code § 1-248.

Count I alleges that Defendants' violate both federal law and Virginia law. *See* Amended Complaint, ¶¶ 34, 43, 44. It is important to understand at the outset the critical interplay between these two sources of legal obligation. The starting point for this analysis is Virginia Code § 1-248, which provides:

> The Constitution and laws of the United States and of the Commonwealth shall be supreme. Any ordinance, resolution, bylaw, rule, regulation, or order of any governing body or any corporation, board, or number of persons *shall not be inconsistent* with the Constitution and laws of the United States or of the Commonwealth.

Va. Code §1-248 (2005)(emphasis added).[6] This is a broad restriction on the powers of Virginia localities, and it does more than merely prohibit those localities from actually *violating* state or federal law. Indeed, if prohibiting actual violations of state or federal statutes were the only goal of §1-248, then §1-248 would be superfluous; it would add nothing to the prohibitions already contained in the state or federal statutes implicated by the locality's conduct. Instead,

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[6] Before October 1, 2005, this statute was previously codified in substantially similar form at Va. Code § 1-13.17.

§1-248 is best viewed as a kind of *preemption* statute. It prohibits localities from taking actions which – whether or not they are otherwise illegal – undermine or frustrate state or federal law. Such preemption is, of course, a well-recognized legal principle, especially as federal law is concerned. As the United States Supreme Court has explained:

> Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when compliance with both federal and state regulations is a physical impossibility, ... or *when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.*

Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 152 (1982)(internal quotation marks and citations omitted)(emphasis added). This federal preemption doctrine precludes the Defendants from providing assistance to the Site for the simple reason that a site providing employment assistance to illegal aliens "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Moreover, the federal preemption doctrine is part and parcel of the "laws of the United States" with which §1-248 forbids inconsistency. By enacting that statute, the General Assembly has given the doctrine the additional weight of state law, thereby making it enforceable by these Taxpayers in challenging the actions of their local governments.

It must be emphasized these same preemption principles apply even though the subject matter may be one of particular interest to the local government. *De La Cuesta*, 458 U.S. at 152 (rejecting view that preemption should not apply "simply because real property law is a matter of special concern to the States"). Indeed, "[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail." *Id.* (internal quotation marks and citations omitted). Thus, there is no exception – either in federal preemption doctrine or in §1-248 – for actions

involving a locality's use of local tax dollars or local public property.

There is likewise no exception for local actions that tend to frustrate federal immigration laws. On the contrary, the Supreme Court has treated those laws as having particular importance, striking down governmental action tending to subvert those laws even when that action would advance *other* federal policies. In *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 535 U.S. 137 (2002), the Court reversed an order of the NLRB awarding backpay to an illegal alien. As the Court explained:

> [A]llowing the Board to award backpay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy.... It would encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations.

Id. at 151. So, too, allowing the Town and County to assist in procuring employment for illegal aliens would unduly trench on the same prohibitions; it would encourage illegal aliens in successfully evading apprehension by federal immigration authorities; and it would condone and encourage violations of immigration laws. If the NLRB, an agency of the federal government, is precluded from taking action having such consequences, even when such action would advance other federal labor policies, then *a foritoiri* these local governments, which invoke no competing federal policies in their defense, must be precluded as well.

Significantly, Congress has described "employment as the magnet that attracts aliens here illegally." *See* H.R. Rep. No. 99-682(I), at 46 (1986), reprinted in 1986 U.S.C.C.A.N. 5649, 5650. By using taxpayer resources to enable and facilitate providing employment services to illegal aliens to help them obtain employment, Defendants are undermining the federal immigration laws and violating Virginia law too.

Thus, while the Taxpayers contend that the Town and County have *directly* violated the

prohibitions of federal immigration law, the Court need not go so far as to rule in their favor. In order for the Taxpayers to prevail, it is enough for them to show that the actions they challenge "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," when it enacted the federal immigration laws invoked here. Because the Amended Complaint is written broadly enough to permit such a showing, the Demurrers must be overruled.

2. Defendants' Conduct Violates Federal Law.

Plaintiffs allege that Defendants' use of taxpayer resources to establish and support the Site violates the following federal statutes:

a. 8 U.S.C. § 1324(a)(1)(A)(iv)(encouraging or inducing residence by illegal aliens);

b. 8 U.S.C. § 1324(a)(1)(A)(v)(II)(aiding and abetting the above);

c. 8 U.S.C. §§ 1324a(a)(1)(A)(employment of illegal aliens) and

8 U.S.C. § 1324a(a)(1)(B)(i)(employment documentation requirements);

d. 18 U.S.C. § 2 (aiding and abetting);

e. 18 U.S.C. § 371 (conspiracy statute);

f. 8 U.S.C. § 1621 (making it unlawful to provide certain public benefits to illegal aliens).

As discussed below, the facts alleged by Count I show that the Defendants are in *direct violation* of the residency-encouragement offenses listed as (a) and (b); that the employers who hire illegal aliens introduced to them at the Site by PH&H are in violation of the employment and documentation offenses listed as (c); and that those violations of (c) by employers serve as the *predicate offenses* for the violation by the Defendants and by PH&H of the aiding and abetting statute listed as (d). The statutes listed as (c) and (d) also serve as the *predicate offenses* for the conspiracy offenses listed as (e). Finally, the actions of the Defendants violate the

prohibitions of (f) without regard to any of the other statutes listed.

a. 8 U.S.C. § 1324(a)(1)(A)(iv)
(Encouraging or Inducing Residence by Illegal Aliens)

Federal law subjects a person[7] to criminal penalties if such person "encourages or induces an alien to ... reside in the United States, knowing or in reckless disregard of the fact that such ... residence is ... in violation of law." 8 U.S.C. § 1324(a)(1)(A)(iv). As used in this statute, "encourage" means to knowingly instigate, help, or advise, and includes actions taken to convince an illegal alien to stay in this country. *United States v. He*, 245 F.3d 954, 957-60 (7th Cir. 2001). It also includes actions that permit illegal aliens to be more confident they can continue to reside in the United States and actions that offer illegal aliens "a chance to stand equally with all other American citizens." *United States v. Oloyede*, 982 F.2d 133, 136 (4th Cir. 1992). "Induce" means to knowingly bring about, affect, cause, or influence an act or course of conduct. *United States v. He*, 245 F.3d at 957-60. The statute's "knowing or in reckless disregard" language means that guilty knowledge is an element of this offense. *United States v. Oloyede*, 982 F.2d at 137.

Defendants argue that Plaintiffs have failed to allege a nexus between their alleged conduct and encouraging or inducing illegal aliens to reside in this country. *See* Town Brief, p. 8; County Brief, pp. 6-7. This argument ignores the plain reality that "employment [is] the magnet that attracts aliens here illegally." *See* H.R. Rep. No. 99-682(I), at 46 (1986), reprinted in 1986 U.S.C.C.A.N. 5649, 5650. Defendants' argument ignores what was self-evident to the members of the Town Council who opposed the application for the Site, namely, that

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[7] This statute applies to any person, not just employers or employment referral agencies. *See United States v. Oloyede*, 982 F.2d 133, 136 (4th Cir. 1992) ("Thus, appellants' argument that ICRA was intended to apply only to employers must fall. Congress intended to give broad scope to the class of persons whose conduct is proscribed by the statute."); *United States v. Zheng*, 306 F.3d 1080, 1085 (11th Cir. 2002); *Villegas-Valenzuela v. INS*, 103 F.3d 805, 810 (9th Cir. 1996).

Defendants' use of taxpayer resources to establish and support the Site was an endorsement of illegal immigration. *See* Amended Complaint, ¶ 26.

The nexus that Defendants' argument totally misses is that Defendants' use of taxpayer resources to establish and support PH&H's providing employment services to illegal aliens and the unlawful hiring of illegal aliens at the Site "encourages" illegal aliens to continue to reside in the Unites States in violation of § 1324(a)(1)(A)(iv). Without question, employment gives the illegal aliens both the incentive and the financial means to maintain their illegal residence in the United States. By providing illegal aliens with a means to obtain unlawful employment, Defendants also "induce" the illegal aliens to reside in the United States because Defendants' actions make it possible for them to receive employment services and help finding work, thus causing them to become more confident they can reside in the United States. This is self-evident even to Defendants because, without employment, it is not likely illegal aliens would have the financial means to reside in the United States, much less a high cost-of-living area like Fairfax County.

The nexus between Defendants' conduct and the encouragement or inducement of illegal aliens to reside illegally in this country required under §1324(a)(1)(A)(iv) is established by the alleged facts and reasonable inferences therefrom. Defendants knew that unlawful hiring of illegal aliens would occur at the Site and intended to facilitate such unlawful hiring because: (1) the stated purpose of the Site was intended to assist undocumented workers obtain employment, even though they are not eligible to work in this country (Amended Complaint, ¶ 18, 23); (2) based upon the Survey, the Site likely would be used by an overwhelming majority of undocumented day laborers, who were ineligible to work in this country (*id.* at ¶¶ 24, 25, 31, 32); (3) the Site is intended to assist undocumented workers *i.e.*, illegal aliens (*id.* at ¶ 23, 25, 32); (4)

PH&H would provide employment services to undocumented day laborers to help them find work, even though they were not eligible to work in this country (*id.* at ¶¶ 21, 24, 32); (5) PH&H would not screen day laborers to exclude day laborers who were ineligible to work in the United States (*id.* at ¶¶ 28, 32, 33); and (6) members of the Town Council who opposed the approval of the application for the Site publicly stated at the Town Council meeting on August 17, 2005 that establishment of the Site was an endorsement of illegal immigration (*id.* at ¶ 26). Given that employment is the magnet that attracts illegal aliens to come to and reside in this country, the unlawful hiring of illegal aliens at the Site gave them both the incentive and the financial means to reside illegally in this country. Again, it was abundantly clear to the Town Council members who opposed approval of the application for the site that Defendants' conduct amounted to an endorsement of illegal immigration. *Id.* at ¶ 26.

The Town attempts to absolve itself of "encouraging" or "inducing" illegal aliens to reside in this country in violation of federal law by superficially arguing that, like a state employment agency, it had no statutory duty to verify the employment eligibility of the illegal day laborers at the Site. *See* Town Brief, p. 8. This "red herring" argument is erroneous for three reasons.

First, on its face, § 1324(a)(1)(A) applies to any person, not simply those with a duty to verify employment eligibility. *Oloyede*, 982 F.2d at 136. Therefore, this statute plainly applies to the Town.

Second, the Town's duty here is not derived from regulations governing state employment agencies. Rather, it is based squarely upon Virginia Code § 1-248, which requires the Town to act in a manner consistent with federal law, such as 8 U.S.C. § 1324(a)(1)(A)(iv). Virginia Code §1-248 requires the Town to take appropriate action – at a minimum, to require

the screening of day laborers – to prevent the unlawful hiring of illegal aliens at the Site. Instead, the Town failed to prevent the violation of federal law by failing to require screening of the day laborers using the Site and, thereby, allowing unlawful hiring of illegal aliens to occur. The Town violated its express duty under § 1-248. Thus, the Town's argument has no merit.

Three, the Town's argument is totally disingenuous because it knew that: (1) the vast majority of the day laborers using the Site would be illegal aliens who are not eligible to work in this country; and (2) the stated purpose of the Site was to help illegal aliens obtain employment by providing them with employment services and matching them with prospective employers. The Town's argument is merely a "red herring" to divert the Court's attention from the critical fact that the Town knew the vast majority of the day laborers at the Site would be illegal aliens. Therefore, the Town's argument should be rejected.

b. 8 U.S.C. § 1324(a)(1)(A)(v)(II) (Aiding and Abetting the Encouragement or Inducement of Residence by Illegal Aliens)

Defendants' alleged conduct also violates 8 U.S.C. § 1324(a)(1)(A)(v)(II), which makes it unlawful for any person to aid or abet the commission of, among other things, any act that knowingly encourages or induces an illegal alien to reside in this country. *See* 8 U.S.C. § 1324(a)(1)(A)(v)(II). "To aid or abet another to commit a crime [violation of federal law] it is necessary that a defendant 'in some way associate himself with the venture, that he participate in it as in something he wishes to bring about, [and] that he seek by his action to make it succeed.'" *Nye & Nissen v. United States,* 336 U.S. 613, 619 (1949)(quoting *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938). Simply put, "aiding and abetting means to assist the perpetrator of the crime." *United States v. Williams*, 341 U.S. 58, 64 (1951).

Here, the Town's approval of the application for the Site and its use of taxpayer property

for the Site, as well as the County's authorization of taxpayer funds to support the operation of the Site, are participatory acts that enable and support the activities at the Site and show Defendants' intent to bring about the success of those activities *i.e.*, to help illegal aliens obtain employment in violation of federal law. These alleged facts are sufficient to support the offenses of aiding or abetting of illegal hiring at the Site and illegally encouraging and inducing illegal aliens to reside unlawfully in this country.

Defendants assert that their conduct does not violate this aiding and abetting statute solely because Plaintiffs purportedly have failed to allege Defendants committed the substantive offense of knowingly encouraging or inducing an illegal alien to reside illegally in this country. *See* Town Brief, p. 6; County Brief, p. 7. This argument is without merit for two reasons.

First, as discussed in Section III.B.2.a. immediately above, Plaintiffs have alleged facts supporting their claim that Defendants' conduct violates § 1324(a)(1)(A)(iv). *See* pages 11-13 *supra*. For the same reasons, the conduct of PH&H also violates § 1324(a)(1)(A)(iv). *Id.* Therefore, the facts alleged in Count I support the claim that the conduct of each Defendant constitutes aiding and abetting a violation of § 1324(a)(1)(A)(iv) by the other Defendant and PH&H.

Second, the federal courts have held that helping an alien obtain a social security card, which, in turn, enabled the alien to secure employment violates § 1324(a)(1)(A)(iv). *See United States v. Oloyede*, 982 F.3d at 137; *United States v. Ndiaye*, 434 F.3d 1270 (11th Cir. 2006); *United States v. Kuku*, 129 F.3d 1435, 1437 (11th Cir. 1997). The instant case is more egregious than providing documentation that would enable an illegal alien to find employment. Here, Defendants are enabling and supporting actual assistance to illegal aliens in securing employment. Thus, Defendants' arguments should be rejected.

c. 8 U.S.C. § 1324a (Employment of Illegal Aliens and Employment Documentation Requirements)

In the Immigration Reform and Control Act of 1986 ("IRCA"), Congress enacted a comprehensive scheme prohibiting the employment of illegal aliens in the United States. *See* §101(a)(1), 100 Stat. 3360, 8 U.S.C. § 1324a. The IRCA "forcefully" made combating the employment of illegal aliens central to "the policy of immigration law." *INS v. National Center for Immigrants' Rights, Inc.*, 502 U.S. 183, 194 and n. 8 (1991). IRCA § 1324a(a)(1) established an extensive "employment verification system" that makes it unlawful to employ aliens who (a) are not lawfully present in the United States, or (b) are not lawfully authorized to work in the United States.[8] *See* 8 U.S.C. §§ 1324a(a)(1) and 1324a(h)(3). This verification system is critical to the IRCA regime. To enforce this verification system, the IRCA mandates that employers verify the identity and eligibility of all new hires by examining specified documents before they begin work. *Id.* at § 1324a(b). If an illegal alien is unable to present the required documentation, he cannot lawfully be hired. *Id.* at § 1324a(a)(1).

Specifically, § 1324a(a)(1)(A) makes it unlawful for a person or entity "to hire, or to recruit for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien (as defined in subsection (h)(3)) with respect to such employment." *See* 8 U.S.C. §1324a(a)(1)(A). Additionally, IRCA § 1324a(a)(1)(B)(i) makes it unlawful "to hire for employment in the United States an individual without complying with the requirements of

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[8] For an alien to be "authorized" to work in the United States, he or she must possess "a valid social security account number card," (8 U.S.C. § 1324a(b)(C)(i)), or "other documentation evidencing authorization of employment in the United States which the Attorney General [of the United States] finds, by regulation, to be acceptable for purposes of this section," (8 U.S.C. § 1324a(b)(C)(ii)). *See also* 8 U.S.C. § 1324a(h)(3)(B) (defining "unauthorized alien" as any alien "[not] authorized to be so employed by this chapter or by the Attorney General").

subsection (b) [employment verification requirements]...." *See* 8 U.S.C. § 1324a(a)(1)(B)(i).

Defendants assert that these statutes place the burden of compliance solely on employers and employees, not upon the Town or County, and that Plaintiffs have failed to allege that Defendants are employers or prospective employers of illegal aliens at the Site. *See* Town Brief, pp. 6-8; County Brief, pp. 5-6. As the Amended Complaint makes clear, Plaintiffs do not allege that Defendants actually hired illegal aliens at the Site. Instead, Plaintiffs alleged that Defendants aided and abetted the hiring of illegal aliens at the Site and conspired with each other, PH&H and yet unidentified employers to help illegal aliens obtain employment in violation of § 1324a. As shown in the discussion of the federal aiding and abetting statute immediately below, this makes Defendants liable for such illegal hiring just like the employers and illegal aliens.

d. 18 U.S.C. § 2 (Aiding and Abetting)

Count I alleges that Defendants' actions also violate the federal aiding and abetting statute (18 U.S.C. § 2). *See* Amended Complaint, ¶¶ 37, 43-45. 18 U.S.C. § 2(a) does not define a separate offense but makes it unlawful to aid or abet another in the commission of a substantive offense. 18 U.S.C. § 2 provides as follows: "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." This statute does not create a separate violation, but rather abolishes the common law distinction between principals and accessories. *See United States v. Perry,* 643 F.2d 38, 45 (2d Cir. 1981). Thus, one who aids and abets the violation of a federal law, such as § 1324a is guilty of violating that law just like the employer and the illegal alien. *Id.* "The aiding and abetting provision of 18 U.S.C. § 2 ... is applicable to the entire criminal code" unless Congress plainly says otherwise. *See United States v. Ramirez-Martinez*, 273 F.3d 903, 911 (9th Cir.

2001)(quoting *United States v. Jones*, 678 F.2d 102, 105 (9th Cir 1982)).

As mentioned above, to aid or abet another to commit a violation, a defendant must in some way associate himself with the venture such that his participation is intended to bring about the violation or make it succeed. *See* pp. 14 *supra*. To be guilty of aiding and abetting a violation of federal law under 18 U.S.C. § 2, a defendant must have the same mental state as that necessary to hold a principal liable for the offense. *See United States v. Searan*, 259 F.3d 434, 444 (6th Cir. 2001)(citing *United States v. Loder*, 23 F.3d 586, 591(1st Cir. 1994).

Here, the Town's approval of the application for the Site and use of taxpayer property for the Site and the County's authorization of taxpayer funds to support the operation of the Site are participatory acts that enable and support the activities at the Site and show Defendants' clear intent to bring about the success of those activities *i.e.*, to help illegal aliens obtain employment in violation of federal law. As discussed Section III.B.2.a. above, Defendants knew that unlawful hiring of illegal aliens would likely occur at the Site. *See* pp. 11-13 *supra*. These alleged facts are sufficient to support the offenses of aiding or abetting the illegal hiring at the Site in violation of § 1324a and the encouraging and inducing of illegal aliens to reside in this country in violation of § 1324.

e. 18 U.S.C. § 371 (Conspiracy)

Count I also alleges that Defendants' actions violated the federal conspiracy statute (18 U.S.C. § 371). *See* Amended Complaint, ¶¶ 36, 43-45. This statute provides in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more or such person do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 371. A conspiracy is an agreement between two or more persons to commit an unlawful act in which the conspirators knowingly and voluntarily participate and an overt act in

furtherance of the agreement. *See United States v. Meredith*, 824 F.2d 1418, 1428 (4th Cir. 1987). An agreement between co-conspirators may be tacit and circumstantially evidenced by their conduct. *Id.; United States v. Ellzey*, 874 F.2d 324, 328 (6th Cir. 1989).

By their actions, Defendants conspired with each other and with PH&H to provide employment services to illegal aliens and help illegal aliens obtain employment in violation of various federal laws and Virginia law. *See* Amended Complaint, ¶¶ 14-33, 43-45. Specifically, the Town conspired with PH&H and the County by approving PH&H's application for the Site and giving PH&H the rent-free use of taxpayer property to establish the Site, and the County conspired with the Town and PH&H by authorizing taxpayer funds to support the operation of the Site. *See* Amended Complaint, ¶¶ 14-33. The object of the conspiracy was to facilitate the unlawful hiring of illegal day laborers at the Site, which would have the effect of encouraging and inducing illegal aliens to continue to reside in this country. *Id.* at ¶¶ 22, 23, 24, 25, 26, 31, 32. As previously discussed in Section III.B.2.a. above, both the Town and County knew that PH&H would provide employment services to illegal aliens and that unlawful hiring of illegal aliens would occur at the Site, and both the Town and the County intended by their actions to facilitate such unlawful hiring. *See* pp. 11-13 *supra.*

The Town summarily contends that, because Plaintiffs have not shown any substantive violation of federal law, they cannot show any conspiracy to violate federal law. *See* Town Brief, p. 6. The County argues that Plaintiffs have failed to show: (1) any "contractual relationship" between Defendants and the Site operator; and (2) how the taxpayer funds would be used the Site. See County Brief, pp. 7-8. These arguments are without merit.

First, as has been shown, the Town's premise that Plaintiffs failed to show Defendants' conduct violates federal law is erroneous. Furthermore, it is elementary hornbook law that a

defendant may be guilty of conspiring to violate federal law, even though the object of the conspiracy is never consummated. *See United States v. Fruehauf*, 577 F.2d 1038, 1071 (6th Cir. 1978). Simply put, a conspiracy by itself is a complete offense, even if the object of the conspiracy is never accomplished. *See United States v. Dempsey,* 733 F.2d 392, 396 (6th Cir. 1984)). For this reason, the Town's argument that its actions cannot amount to a conspiracy to violate federal law lacks merit.

Second, Defendants' conduct violates § 371 because: (1) Defendants' conduct evidences that they implicitly agreed with each other and with PH&H and knowingly participated in a scheme to provide employment services to illegal day laborers at the Site and to help illegal aliens obtain employment in violation of the federal laws set forth in Count I (*see* Amended Complaint, ¶¶ 35, 43-45); and (2) each Defendant committed an overt act -- the Town approved the application for the Site and the County authorized taxpayer funds to support the Site – in furtherance of the conspiracy.

Third, contrary to the County's assertion, Plaintiffs have alleged that the taxpayer funds authorized by the County would be used to support the Site. *See* Amended Complaint, ¶¶ 29, 30. Indeed, at the hearing held on December 16, 2005 in this case, the County attorney admitted that the County authorized taxpayer funds to support the operation of the Site. *See* Transcript of Hearing on December 16, 2005, p.53, lines 20-23 and p. 54, lines 19-20, attached as Exhibit 2. Thus, this argument also is without any merit.

f. 8 U.S.C. § 1621 (Prohibition on State or Local Public Benefits to Illegal Aliens).

Count I also alleges that Defendants enabled and supported PH&H to provide employment services to illegal aliens in violation of 8 U.S.C. § 1621. This statute prohibits the provision of certain state or local benefits to illegal aliens. *See* Amended Complaint, ¶¶ 14, 15,

16, 18, 21-25. The statute defines "State or local benefit" to include any grant provided by appropriated funds of a State or local government, as well as any "unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual ... by an agency of the State or local government or by appropriated funds of a State or local government." *See* 8 U.S.C. § 1621(a) and (c). Certain benefits are excluded from this prohibition, including health care or emergency medical assistance, emergency disaster relief, public health assistance for immunizations and certain in-kind services administered for the protection of life or safety without regard to the recipient's income or resources. *Id.* at § 1621(b).

Defendants argue that Plaintiffs failed to allege that they are providing any prohibited state or local benefits as defined in § 1621. *See* Town Brief, p. 8; County Brief, pp. 10-11. These arguments are without merit for two reasons.

First, the fact that Defendants are not directly providing employment benefits to illegal aliens at the Site does not absolve them from liability for enabling and supporting the violation of § 1621. Defendants may not do indirectly what they are prohibited from doing directly.

Second, the employment benefits at issue – job training, job development and workers rights assistance – fall within § 1621's prohibition against providing "employment benefits" or "similar benefits" to illegal aliens. According to the Virginia Employment Commission's ("VEC's") website (www.vec.virginia.gov), the VEC provides a variety of types of non-monetary unemployment benefits to unemployed persons, including screening and referral of applicants to employers, job placement, training referrals, and job search skill building activities. These unemployment benefits include many of the same types of employment services Defendants are making available to illegal aliens at the Site. It is counterintuitive and totally

illogical to think that Congress meant to allow states and local governments to provide employment services to illegal aliens who are not authorized to work in this country. Providing an illegal alien with unemployment and similar benefits to enable him to obtain employment in violation of federal law trenches upon the explicit statutory prohibitions critical to federal immigration policy. *See Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 535 U.S. 137 (2002)(holding that NLRB backpay award to undocumented worker subverted federal immigration laws). It would be contrary to the plain meaning of § 1621 and to federal immigration policy to allow Defendants to authorize, enable, and financially support PH&H's providing of employment services to illegal aliens so they can obtain employment in violation of federal law. *Id.* Thus, Defendants' arguments are without merit.

In conclusion, the foregoing discussion has shown how the actions of Defendants violate various federal statutes. Yet, the test of whether their actions are lawful is not whether they might be charged with such a violation in federal court. Given the Virginia law requirement that these Defendants not act inconsistently with federal law, the Plaintiffs need only show that their actions "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *De La Cuesta*, 458 U.S. at 152.

IV. COUNT II OF THE AMENDED COMPLAINT PROPERLY STATES A CAUSE OF ACTION FOR VIOLATION OF VIRGINIA CODE § 63.2-503.1.

Because this Court rejected the Town's lone argument of timeliness originally advanced in support of its demurrer to Count II, the Town raises a new argument as to Count II in its supplemental brief. Now, the Town contends that providing employment services to illegal aliens to help them obtain unlawful employment is not "state or local public assistance pursuant to [Subtitle II of §63.2]." This argument, like the Town's timeliness argument, lacks merit.

The term "public assistance" is defined in Subtitle I of § 63.2 to mean: "Temporary Assistance for Needy Families (TANF); auxiliary grants to the aged, blind and disabled; medical assistance; energy assistance; food stamps; employment services; child care; and general relief." *See* Virginia Code § 63.2-100 (emphasis added). This definition applies to all of Title 63.2, which obviously includes Subtitle II. *Id.* Thus, public assistance within the scope of Title 63.2 expressly includes employment services. The Town's argument that public assistance under Subtitle II somehow excludes employment services ignores this clear definition. Furthermore, it is inconceivable that the Virginia legislature, in enacting § 63.2-503.1, meant to allow public assistance in the form of employment services to be provided to illegal aliens, as that would be contrary to Virginia Code § 1-248. For all the reasons set forth above, providing employment services to illegal aliens to help them obtain employment violates § 63.2-503.1, as well as federal law and Virginia Code § 1-248.

V. COUNT IV OF THE AMENDED COMPLAINT PROPERLY STATES A CAUSE OF ACTION AGAINST THE TOWN FOR ARBITRARY, CAPRICIOUS AND UNREASONABLE ACTS.

Count IV alleges that the Town's use of taxpayer property to establish the Site constitutes an arbitrary, capricious and unreasonable act for each of the following independent reasons. First, as discussed above, the Town's actions violate federal law and Virginia Code § 1-248. Count IV is interdependent with Count I because, if the Town's actions violate federal law and Virginia Code § 1-248 as alleged in Count I, then such actions are *per se* arbitrary, capricious and unreasonable. For this reason, the Town's demurrer to Count IV should be denied.

Second, as alleged in Count II and for all the reasons discussed above, Defendants' actions violate Virginia Code § 63.2-503.1.

Third, the Town's actions also violate Herndon zoning ordinance § 78-107(11), which

requires that "all activities conducted on the site shall be carried out in a lawful manner, as determined by competent Town, Virginia or federal authority." (Emphasis added.) The Town attempts to absolve itself of any impropriety here, arguing that the conditional use permit granted to PH&H facially obligated PH&H to comply with all applicable requirements and required it to disseminate certain information to prospective employers about compliance with federal immigration laws. *See* Town Brief, pp. 10-11. To the Town's chagrin, the alleged facts are lopsided in favor of Plaintiffs.

As previously discussed in Section III.B.2.a. above, Defendants knew that unlawful hiring of illegal aliens would occur at the Site and intended to facilitate such unlawful hiring. *See* pp. 11-13 *supra*. The Town cannot credibly maintain that it is consistent with federal immigration laws and policy to directly or indirectly provide employment services to illegal aliens, who are not eligible to work in this country, for the stated purpose of helping them find work. This was abundantly clear to the Town Council members who opposed approval of the application for the Site as they publicly stated at the Town Council meeting on August 17, 2005 that the Town's conduct amounted to an endorsement of illegal immigration. *Id.* at ¶ 26. The Town cannot absolve itself by facially requiring compliance with applicable law where, as here, it enabled and supported PH&H's providing employment services to illegal day laborers with the obvious expectation that they would find employment at the Site and it knew that the rarely-enforced federal immigration laws would be violated by the hiring of illegal aliens at the Site. Indeed, finding employment for the illegal day laborers using the Site was the stated purpose for the Site. *Id.* at ¶¶ 18, 21-25, 31, 32. For this additional reason, the Town's actions were arbitrary, capricious and unreasonable.

Fourth, even if the Town's actions were not, in themselves, direct violations of federal

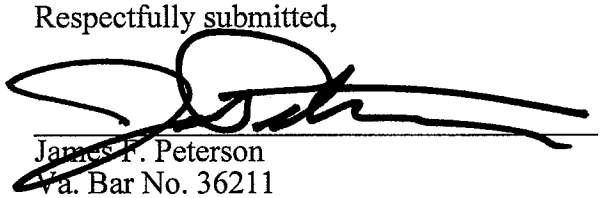
law, those actions still would be unreasonable because they have the natural – indeed, intended – consequence of encouraging and facilitating actions by others that violate federal law, and because they "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *De La Cuesta*, 458 U.S. at 152. Because the Town's alleged actions are an unreasonable method of discharging any powers it may have, the Town has no authority to engage in them. *See Arlington County v. White*, 259 Va. 708, 712, 528 S.E.2d 706, 708 (2000).

Finally, the Town contends that its Conditional Use Permit obligates the operator to comply with "all applicable requirements" of the law. Town Br. at 10. However, the resolution adopted by the Town of August 17, 2005, is less than comforting on these points. While the resolution pays lip service to federal and state law, it then goes on to say that "[n]othing in this condition shall be construed to suggest or require that the zoning administrator enforce any set of laws *other than the town's zoning ordinance*." Resolution, ¶ 2(q)(emphasis added)(attached to Amended Complaint as Exhibit 1). Thus, by a wink and a nod, the Town has told its zoning administrator not to look for or worry about violations of federal immigration law. The Town also misses the mark when it says it has required PH&H "to disseminate certain information to assure [sic] that employers are complying with applicable law." Town Br. at 10. The resolution does call for making certain information "available to employers using the site." Resolution, ¶ 2(q). Yet, it says nothing about disseminating or assuring or ensuring anything. In any event, the formality of making available information that employers already know – that it is unlawful to hire illegal aliens – is too small a fig leaf to cover the Town's naked purpose of promoting such unlawful hiring. While the Town may wish to stand behind that fig leaf at trial, given the allegations of the Amended Complaint, it avails them nothing on their demurrer.

VI. CONCLUSION.

In conclusion, Virginia Code § 1-248 does not permit Defendants to try to redress local problems by violating federal law. Defendants cannot close their eyes and ignore that they enabled and support the providing of employment services to illegal aliens, who cannot work in this country, to help these illegal aliens obtain employment in violation of federal law. For all the foregoing reasons, Defendants' demurrers to Counts I, II and IV of the Amended Complaint should be denied.

Respectfully submitted,

By: 

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DATE: March 13, 2006

EXHIBIT 1

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COUNTY OF FAIRFAX CITY OF FAIRFAX

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February 10, 2006

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Re: ***Krish Karunakarum, et al. v. Town of Herndon and County of Fairfax, Virginia***
At Chancery No. 2005-4013

Dear Counsel,

This matter came before the Court on Complainants' Amended Bill of Complaint for Declaratory and Injunctive Relief, the Demurrer filed by the Town of Herndon, and the Demurrer and Plea in Bar filed by Fairfax County.

The motions were argued before the Court on December 16, 2005 and in the intervening two months the Court has been able to sort out some of the legal issues, but not all. The following reflects both my conclusions as to how I think the law applies as well as questions I think still remain to be addressed.

At the outset, let me state, that this is not a zoning or land use case. This is a case in which tax payers are alleging that the Town and County are committing an alleged illegal act by virtue of creating and operating a "Temporary Regulated Day Worker Assembly and Hiring Site." (Am. Bill of Complaint, ¶ 15). The Town of Herndon is providing the physical plant for the Day Laborer site as well as funds to operate the site. The County is providing additional monies to fund the site. (Am. Bill of Complaint, ¶¶ 16, 29-30). The Amended Bill of Complaint alleges that the Herndon Town Council "reasonably knew that the Day Laborer Site would be used to assist persons not legally present or authorized to work in the United States" (Am. Bill of Complaint ¶ 25), and that the site "is intended to assist undocumented workers, *i.e.*, immigrants who entered the United States and reside in the United States in violation of the laws of the United States." (Am. Bill of Complaint ¶ 23). Workers will be provided with a variety of employment services at the site, but workers will not be screened to determine their status in the United States. (Am. Bill of Complaint ¶p 21, 28).[1]

Complainants argue in Count I that the expenditure of taxpayer funds and taxpayer-financed resources contravenes 8 U.S.C. § 1324a(a)(1)(A); 8 U.S.C. § 1324(a)(1)(B)(i); 8 U.S.C. § 1324(a)(1)(A)(iv); 8 U.S.C. § 1324(a)(1)(A)(v)(II); 18 U.S.C. § 2; and 8 U.S.C. §1621. (Am. Bill of Complaint ¶ 44).

Complainants argue in Count II that the expenditure of taxpayer funds and taxpayer-financed resources is in violation of both Virginia Code § 63.2-503.1(A) and Virginia Code § 63.2-503.1(B). (Am. Bill of Complaint ¶ 47).

Complainants argue in Count IV that in providing financing and resources to the Day Laborer Site, the Town has acted in contravention of federal law, Virginia law, and local ordinances, including 8 U.S.C. § 1324a(a)(1)(A); 8 U.S.C. § 1324(a)(1)(B)(i); 8 U.S.C. § 1324(a)(1)(A)(iv); 8 U.S.C. § 1324(a)(1)(A)(v)(II); 18 U.S.C. § 371; 18 U.S.C. § 2; 8 U.S.C. §1621; Virginia Code § 63.2-503.1; and Town of Herndon Zoning Ordinance § 78-107(11). (Am. Bill of Complaint ¶¶ 54-55).

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[1] The Bill of Complaint alleges that the Town and County intended to benefit illegal aliens. I am obliged to take the pleadings as they are for purposes of demurrer. However, one could conceive of a trial centering around this issue of intent, that is, are the alleged failings of the Town and County acts of commission or omission? Without screening it would be impossible to determine whether workers were documented or not.

It is important to note that Complainants are not seeking redress under the federal statutes recited above, but instead bring their claim under Virginia Code § 1-248. Virginia Code § 1-248 states "The Constitution and laws of the United States and of the Commonwealth shall be supreme. Any ordinance, resolution, bylaw, rule, regulation, or order of any governing body or any corporation, board, or number of persons shall not be inconsistent with the Constitution and laws of the United States or of the Commonwealth." (Am. Bill of Complaint ¶ 34). In this case, the Complainants are seeking a declaration that the Town and County have acted in a manner inconsistent with state and federal law, thereby violating Virginia Code § 1-248. They are not acting as would-be attorneys general; rather, they are using the statutes in question as a reference point to define the allegations of which they complain.

The Complainants have standing to make these claims. Although the Federal government and the Commonwealth impose strict restrictions on who may bring a taxpayer suit challenging the expenditure of public funds; these requirements are significantly weakened in the context of a local-government oriented taxpayer suit. *See Goldman, et al. v. Landsidle, Comptroller, State of Virginia*, 262 Va. 364, 372 (2001). In fact, "the right of taxpayers to challenge the legality of expenditures by local governments is a right permitted in almost every state. This right is premised on the peculiar relationship of the taxpayer to the local government that makes the taxpayer's interest in the application of municipal revenues 'direct and immediate.'" *Id.*

In reaching this determination in *Goldman,* Justice Keenan relies on a long history of cases establishing taxpayer standing to challenge a locality's allegedly inappropriate use of taxpayer funds and resources in excess of its powers.[2] This line of cases begins with *Appalachian Electric Power Company, etc. v. Town of Galax, et al.*, which was decided in 1939 and granted taxpayers standing to proceed in equity to enjoin the issuance of allegedly illegal bonds. *Appalachian Electric Power Co., etc. v. Town of Galax, et al.*, 173 Va. 329, 333 (1939). *Gordon v. Board of Supervisors of Fairfax County, et al.* built on this premise by allowing taxpayers standing to prevent the creation of an illegal tax burden to fund an airport authority. *Gordon v. Board of Supervisors of Fairfax County, et al.*, 207 Va. 827, 830-31 (1967). This was soon followed by *Armstrong v. County of Henrico, et al.* which echoed *Gordon's* holding when concluding taxpayers have standing to attack the alleged illegal diversion of public funds to finance sanitary district expenditures. *Armstrong, et al. v. County of Henrico, et al.*, 212 Va. 66, 76 (1971). Finally, Justice Keenan also relies on *Burk v. Porter*, which allowed taxpayers the right to seek equity in an accounting and reimbursement of expenditures. *Burk v. Porter*, 222 Va. 795, 798 (1981).

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[2] Justice Keenan also authored the Supreme Court's opinion in *Concerned Taxpayers of Brunswick County, et al. v. County of Brunswick, et al.*, 249 Va. 320 (1995). Thus, Justice Keenan is familiar with the difference between the standing necessary to challenge a zoning decision and that required to raise allegations that a locality is using funds inappropriately.

Based upon this precedent, the Defendants' argument that the Complainants lack the requisite standing to bring this suit for declaratory judgment must fail. More specifically, standing in this case arises from Complainants' direct and immediate interest in the use of Town and County taxpayer funds and resources to support the Day Laborer Site.

With regard to the allegations in Count II, the County has filed a Plea in Bar alleging that funds provided to the site flow through Subtitle I of Va. Code § 63.2, rather than Subtitle II of Va. Code § 63.2. Assuming the correctness of the County's analysis of the Code Titles, including the legislative history behind Va. Code § 63.2-503.1, this matter is primarily a question of budgetary process, it seems to me, and should be set down for a hearing on that issue as set out in the Plea in Bar. Since the alleged offense is an ongoing one, it seems to the Court to make little difference that the statute in question was not effective until January 2006, three (3) months after the filing of the suit.

With reference to Count III, Complainants have asserted that by providing funding and resources to the Day Laborer Site, the County and Town have acted in violation of the Dillon Rule. The Dillon Rule "provides that municipal corporations possess and can exercise three kinds of powers: a) those expressly granted by the General Assembly; b) those necessarily or fairly implied; and c) those that are essential and indispensable." *Norton v. Danville*, 268 Va. 402, 408 n.3 (2004). The Town and County's demurrers are sustained as to this count for the reasons set forth in their briefs. The Complainants are not granted leave to amend their Bill of Complaint as to this count, the issue being discrete and related to the authority of local governments generally.

With regard to the allegations in Count I and Count IV, for the purposes of a demurrer, do the actions described in the Bill of Complaint, for instance, paragraphs 22 through 30, violate the cited federal, state and local ordinances as a matter of law? This issue has not been addressed by the pleadings in anything but a cursory form. Now that some issues have been addressed by the court, I am asking the Defendants to address this question more fully. I presume that the Defendants think that this is still an open question on demurrer.

The parties are asked to prepare briefs on this question. The Town and County shall file first and are limited to twenty (20) pages. These opening briefs should be filed with the Clerk of the Court by Monday, February 27, 2006, with a copy delivered to my Law Clerk, in Chambers. A brief in opposition may be filed by the Complainants and is due by March 13, 2006. This briefing schedule is subject to modification if inconvenient to any of the parties.

In addition, I leave it to the parties to decide whether to seek to have the case set down on a Friday for an additional hearing on the new briefs, or they may opt to rest on the arguments in their briefs. I will enter a comprehensive order when I have made a final decision on the remaining issues.

Sincerely,

Kathleen H. MacKay

Kathleen H. MacKay

EXHIBIT 2

V I R G I N I A

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

- - - - - - - - - - - - - - - - - X

KRISH KARUNAKARAM, et. al., :

Plaintiffs, :

VS : CL No. 2005-4013

THE TOWN OF HERNDON, et. al., :

Defendants. :

- - - - - - - - - - - - - - - - - X

Friday, December 16, 2005

Fairfax, Virginia

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

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

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

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

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

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

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

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

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Plaintiffs' Supplemental Memorandum in Opposition to Defendants' Demurrers was sent by facsimile and first class mail, postage prepaid, on March 13, 2006 to the following persons:

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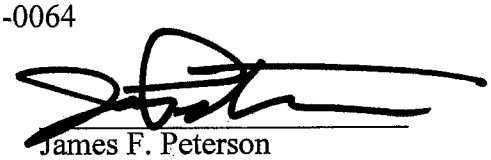

James F. Peterson