

1 VIRGINIA:

2 IN THE CIRCUIT COURT OF THE CITY OF FREDERICKSBURG

3

4 - - - - - X

5 Gordon Shelton, et al, Petitioners, : CH. No.

6 -vs- : CH-2-428

7 Bill Beck, individually, as well :

As in his capacity as Mayor of the

8 City of Fredericksburg, Va., et al, :

9 Respondents. :

10 - - - - - X

11

12 VOLUME II

13

14 EXCERPT of the trial in the above-

15 entitled matter, when heard on December 13, 2002,

16 at 9:00 a.m., before the Honorable John W. Scott,

17 Jr., Judge.

18

19

20

21

1 WHEN THERE WERE PRESENT  
2 ON BEHALF OF THE RESPECTIVE PARTIES:  
3  
4 ON BEHALF OF PETITIONERS: Gordon Shelton,  
5 Anthony Jenkins; Patrick Timpone:  
6  
7 Mr. David Z. Kaufman, Esquire  
8 KAUFMAN LAW OFFICE  
9 10625 Jones Street, Suite 201A  
10 Fairfax, Virginia 22030  
11 (703)764-9080  
12  
13 Mr. Michael Barnsback, Esquire  
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15 908 King Street, Suite 200  
16 Alexandria, Virginia 22314  
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19  
20  
21

1 ON BEHALF OF RESPONDENTS: Bill Beck, Scott Howson,  
2 Dr. Thomas Fortune, Matthew Kelly:  
3  
4 Mr. Howard Stahl, Esquire  
5 Mr. John F. O'Connor, Esquire  
6 STEPTOE & JOHNSON, L.L.P.  
7 1330 Connecticut Avenue, N.W.  
8 Washington, D. C. 20036  
9 (202-249-8095  
10  
11  
12 ON BEHALF OF RESPONDENT WILLIAM WITHERS, JR.:  
13 Mr. William M. Sokol, Esquire  
14 SOKOL & JONES  
15 904 Princess Anne Street, Suite 101  
16 Fredericksburg, Virginia 22401  
17 (540)899-8077  
18  
19 The parties respectively.  
20  
21

1 THE COURT: The Court is going  
2 to take a ten-minute recess.  
3  
4 (Whereupon, at 3:00 p.m., a  
5 recess is taken by the Court; after  
6 which, at 3:10 p.m., the matter  
7 continues as follows):  
8  
9 THE COURT: All right; other  
10 than the e-mails that were generated by  
11 Councilman Fortune in reference to  
12 Historic Preservation, let me ask you  
13 Mr. Kaufman, are you aware of any other  
14 communications that were initiated by  
15 him to anyone in reference to Count 11?  
16 MR. KAUFMAN: Count 11? Your  
17 Honor, I'm aware of them but they fall  
18 on the wrong side of the dateline that  
19 you have posted, and I would like to  
20 explain that.  
21 THE COURT: Um-hum.

1 MR. KAUFMAN: On the 16th of  
2 June, there were two e-mails sent in  
3 which Councilman Fortune, you know,  
4 specifically requested he be considered  
5 for FAMPO. And the reply to that, you  
6 know, to his request went to the Mayor,  
7 Mr. Howson, and Mr. Kelly. And after  
8 that, there is a two-week hiatus; and  
9 when the e-mails start again on the 3rd  
10 of July, he is there and listed as --  
11 for FAMPO, but he makes no further  
12 communications.  
13 THE COURT: Yes.  
14 MR. KAUFMAN: Specifically as  
15 regards the decision on the Library  
16 Board representative where Bev Cameron  
17 was mentioned, that discussion he does  
18 not participate in. And to the extent  
19 that the Court's finding was limited to  
20 that six-odd-day discussion on Mr.  
21 Cameron and the Library Board, he wasn't

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1 part of that --  
2 THE COURT: All right.  
3 MR. KAUFMAN: --you know, but  
4 we still think it should go beyond  
5 that --  
6 THE COURT: I understand.  
7 MR. KAUFMAN: --but those are  
8 the facts, Your Honor.  
9 THE COURT: Given the Court's  
10 ruling in reference to July 1 and the  
11 Court's own investigation, the Court  
12 finds no e-mails were generated by  
13 Mr. Fortune and, therefore, the motion  
14 that he be dismissed is granted.  
15 MR. STAHL: Thank you, Your  
16 Honor.  
17 THE COURT: Now, let's get  
18 back to the motions we were dealing with  
19 before the recess. Would you like to  
20 call any witnesses in reference to the  
21 issue of willful and wanton conduct?

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1 MR. STAHL: No, Your Honor.  
2 THE COURT: All right; closing  
3 argument, Mr. Kaufman?  
4 MR. KAUFMAN: Your Honor, the  
5 statute requires in 2.2-3702 that  
6 Council members within two weeks of  
7 election be given the statute and  
8 familiarize themselves with it.  
9 I think Mr. Howson stated  
10 in his testimony that he hadn't read the  
11 whole statute through; the Mayor said  
12 that he had read the parts that applied  
13 to him. The consistent approach -- I  
14 don't remember, but I can look up Mr.  
15 Kelly's response; but I believe his  
16 statement was, you know, something to  
17 the effect of -- in his deposition was  
18 that he had read the parts that he  
19 thought applied to his business but he  
20 had not concerned himself with things  
21 like the Virginia Board of Educators'

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1 Rules and things like that.  
2 Nonetheless, the statute  
3 requires that they read and take  
4 responsibility for their actions here,  
5 and it is clear that they knew something  
6 was going on with e-mails beforehand,  
7 you know. Mr. Howson said that he knew  
8 of the Attorney General's opinion in '99  
9 before; I think the Mayor said he knew  
10 it before; but they didn't think it  
11 applied to what they were doing.  
12 They knew enough to ask  
13 to put in place a Policies and Proce-  
14 dures manual involving e-mail rules and  
15 the fact that e-mail was a discover-  
16 able document under FOIA. They also,  
17 albeit after Count 11, you know,  
18 decided -- the Count 11 time frame, they  
19 decided to ask Mr. Pates for more  
20 information about it.  
21 But there is a consistent

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1 pattern, Your Honor, which is throughout  
2 much of what we have pled, not just in  
3 Count 11, of being aware of the Freedom  
4 of Information Act statute, but looking  
5 at it, not really paying a whole lot of  
6 attention to it; and then when they get  
7 advice they don't much care for, they  
8 just sort of ignore it and they go on.  
9 They took Mr. Pates' --  
10 an accomplished attorney though he may  
11 be, they took his personal opinion  
12 over -- Mr. Pates' explanation of what  
13 the FOIA Council had said, and they even  
14 took his personal opinion over what he  
15 personally suggested to them they should  
16 do to avoid situations such as the one  
17 we have encountered here. And there is  
18 a pattern, Your Honor; a pattern of  
19 saying, oh, well, this is a document but  
20 the rest of the law doesn't apply to me,  
21 I don't have to worry about the rest of

1 the law.

2 The Court has made, in  
3 its ruling of summary judgment on Count  
4 11, made new law; we concede that. But  
5 they had an obligation under the statute  
6 to know and understand the law.

7 And I think Mayor Beck  
8 testified earlier, we were talking about  
9 Charlotte street, you know, that he had  
10 written and told people that he would  
11 never hide behind the legal technicality  
12 in FOIA; that, you know, open government  
13 would be a priority of his. And here we  
14 are today.

15 And the Court can decide  
16 for itself, but the theme of his  
17 approach of, hey, let's all be open,  
18 would indicate that what he ought to  
19 have done is to be open and not to say,  
20 well, since it is not specifically  
21 prohibited in the statute I'm okay. He

1 should, we contend, have been open.

2 And the same thing  
3 applies for Mr. Howson. If I recall his  
4 testimony correctly, he went to his  
5 first orientation session in 1996, and  
6 he has been familiar with briefings that  
7 have been given to the Council.

8 In fact, he even asked  
9 for a special briefing to be prepared  
10 for the new members by Mr. Pates, which  
11 is the July 17th memo; but as he said,  
12 hey, it wasn't specifically precluded,  
13 there is nothing in the statute that  
14 said e-mail communications are bad.

15 But the law requires open  
16 government, not parsing every sentence.  
17 The law requires that they understand  
18 the purpose of the law and at least read  
19 the part that says it shall be liberally  
20 construed; we want open government, we  
21 want you to be as open as possible, we

1 don't want you to parse our words;  
2 exceptions will be narrowly construed.  
3 That much, at least, they knew. This  
4 has always been their testimony.

5 And as stated, Mr. Howson  
6 was clearly knowledgeable enough to know  
7 something was going on because he asked  
8 Mr. Pates to prepare a briefing for  
9 everybody else. And the briefing that  
10 was prepared isn't just about where the  
11 law is today but about where it is  
12 going.

13 Mr. Pates reported  
14 faithfully what the FOIA Council said,  
15 what his opinion was, and he recommended  
16 things. I'm sure that he was making  
17 those statements and recommendations to  
18 anybody who chose to ask him long before  
19 the 17th of July, if anybody had chosen  
20 to ask. They knew or should have known,  
21 and they chose not to.

1 Mr. Kelly is a different  
2 story here. He is new to the Council.  
3 You can expect him to be a little un-  
4 familiar with FOIA, but Mr. Howson and  
5 Mr. Kelly -- or somebody might have  
6 alerted him, you know, that maybe we  
7 ought to talk about this in public;  
8 maybe we should go read FOIA more care-  
9 fully; remember we have to be open about  
10 everything we want. They didn't; he  
11 didn't.

12 No one stopped to think  
13 about FOIA. Oh, it's a public document;  
14 but if anybody files and requests it, we  
15 will turn it over. But nobody knew what  
16 they were doing; nobody had a clue how  
17 this correspondence is not open govern-  
18 ment; that it violates the spirit of the  
19 law.

20 The City of Fredericks-  
21 burg and its citizens deserve better

1 than this, and the law requires that  
2 they deserve better. It requires that  
3 they get that. Mr. Howson and Mayor  
4 Beck, by dint of service if nothing  
5 else, should have absorbed that lesson.  
6 Open government is what the citizens are  
7 mandated.

8           You can't go behind it  
9 and you can't work in the interest of  
10 the individual words to decide, well,  
11 gee, you know, this little e-mail is  
12 probably okay, but that one is not.  
13 Liberal. And they knew that. And,  
14 therefore, we ask that the Court find  
15 that they willfully and intentionally  
16 acted privately and secretly, rather  
17 than openly.

18           And I would add for the  
19 Court that everything they did is per-  
20 fectly proper if it is done in an open  
21 meeting. Every one of the counts that

1 matter of law, or on summary judgment  
2 concluded in the respondents' favor they  
3 were defective as a matter of fact. And  
4 three of them they withdrew themselves  
5 because they knew they were baseless on  
6 their face.

7           So we are talking about  
8 one count out of 18; a series of  
9 e-mails, which the only evidence before  
10 you establishes the following: They  
11 were sent on garden variety computer  
12 e-mail format; no list serve, no chat  
13 room, nothing simultaneous; what they  
14 had always done, whatever everybody  
15 across Virginia does.

16           There was not until this  
17 morning a ruling in the Commonwealth of  
18 Virginia, with all due deference to Your  
19 Honor, that said the exchange of e-mails  
20 in this way could constitute a meeting.  
21 There hasn't been a ruling by the

1 we alleged, had they done them openly,  
2 none of this would have happened; it  
3 simply wouldn't have.

4           But, no, they chose to do  
5 it privately and without notice; and  
6 that is contrary to the letter and the  
7 spirit of FOIA. And, therefore, we ask  
8 that this Court find that they did it  
9 intentionally and wrongfully. Thank  
10 you.

11           THE COURT: Mr. Stahl.

12           MR. STAHL: Thank you, Your  
13 Honor.

14           This is like Alice in  
15 Wonderland. This is like nothing in 30  
16 years practicing law I have ever heard.

17           Here is the evidence  
18 that's before Your Honor. We only have  
19 one count left, Your Honor, out of 18.  
20 The other 17 were dismissed by Your  
21 Honor because they were defective as a

1 Attorney General that says this type of  
2 exchange of e-mails could constitute a  
3 meeting. The FOIA Council itself, the  
4 greatest advocate for open government,  
5 has said this could never constitute a  
6 meeting.

7           Your Honor is the first  
8 Court, person, agency, authority, that  
9 we are aware of to make this rule. And  
10 as petitioners' counsel astonishingly  
11 conceded, he said quote, "We've made new  
12 law; we concede that."

13           Having made new law, he  
14 has the temerity, the audacity, to turn  
15 around and say that the three respon-  
16 dents that Your Honor has said did  
17 violate the open-meeting law by this  
18 exchange of e-mails, that they should be  
19 found to have done it willfully and  
20 intentionally.

21           How could, by definition,

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1 it ever have been willful or intentional  
2 when it wasn't law until this morning?  
3 If anyone ought to be  
4 ashamed about what has been done to  
5 public government and open government,  
6 it is the petitioners in this case. We  
7 will deal, I hope, Your Honor, later  
8 today with sanctions.  
9 THE COURT: I haven't gotten  
10 there, yet, Mr. Stahl.  
11 MR. STAHL: I understand and I  
12 won't get there now, albeit the tempta-  
13 tion is great; but I won't go there.  
14 But as to the other  
15 counts: Baseless. The Charlotte Street  
16 meeting? Have you ever heard anything  
17 like it in your life, anything more  
18 undemocratic, unAmerican, than what the  
19 petitioners were arguing; that elected  
20 officials should never go hear what the  
21 citizens want?

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1 MR. KAUFMAN: Your Honor --  
2 THE COURT: Don't interrupt  
3 him. This is closing argument. Have a  
4 seat, Mr. Kaufman.  
5 MR. STAHL: The outrage is  
6 that the City of Fredericksburg has had  
7 to spend probably 80-or-\$90,000 on my  
8 law firm and Mr. Sokol's to defend a  
9 totally baseless case with one count  
10 left where the respondents were found  
11 liable; and on the admission of the  
12 petitioners, we made new law.  
13 On this point, not sanc-  
14 tions, even the mere thought of the  
15 imposition of a fine or an award of  
16 attorneys fees for this group is abso-  
17 lutely impossible, Your Honor, with all  
18 due deference on the record before you.  
19 THE COURT: You may respond if  
20 you wish, Mr. Kaufman.  
21 MR. KAUFMAN: No, Your Honor.

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1 It doesn't merit any.  
2 THE COURT: The Court on the  
3 record before it cannot find willful and  
4 wanton conduct. The motion for sanc-  
5 tions under that provision of FOIA is  
6 denied.  
7 Now, I have one other  
8 issue. That's your motion.  
9 MR. STAHL: Your Honor, we  
10 have pending before you a motion for  
11 sanctions with respect to the filing of  
12 Counts 15, 16, and 18, which we claim to  
13 have been done in violation of Virginia  
14 Code Section 8.01-271.1.  
15 And what we have provided  
16 to Your Honor, which has been un rebutted  
17 by the petitioners -- they haven't filed  
18 an opposition, they haven't offered any  
19 affidavit -- is 30 pages or thereabout  
20 of deposition transcripts, where both  
21 parties were present through counsel,

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1 with full right of cross examination to  
2 show that the three meeting counts which  
3 the plaintiffs, the petitioners, them-  
4 selves voluntarily dismissed because  
5 they knew they were baseless, were filed  
6 in violation of the rule I just cited,  
7 because neither the petitioners nor  
8 there counsel undertook any investiga-  
9 tion of any kind to determine any under-  
10 lying facts that would support those  
11 allegations.  
12 We would proffer to Your  
13 Honor that we have made this motion; we  
14 have offered the deposition testimony of  
15 Shelton, Jenkins, and Timpone. With  
16 that evidence before Your Honor -- both  
17 sides have used deposition transcripts  
18 today in the course of this hearing for  
19 a number of purposes, and I don't  
20 believe that anyone is going to object  
21 today that they are not authentic and

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1 admissible for this purpose -- the  
2 burden is now on the petitioners to show  
3 that notwithstanding everything that's  
4 in this motion, the 30 pages of tran-  
5 script, references quotations of  
6 Shelton, Timpone, and Jenkins, that they  
7 somehow had some basis for what they  
8 alleged.

9 And I have to say, Your  
10 Honor, that the single-most egregious of  
11 the three, not that they all three are  
12 not palpably egregious, is the Fred bus  
13 trip, Count 16, which they allege in the  
14 most dramatic fashion; secretly getting  
15 on the bus, secretly getting off the  
16 bus, having a conversation about City  
17 business, deliberately excluding members  
18 of Council. It never even happened.  
19 The other two didn't happen either, but  
20 this one didn't happen under any circum-  
21 stances. No one in their right mind

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1 could have thought it was.

2 You know where Timpone  
3 got his evidence? In his deposition, he  
4 was standing in the line at a 7-Eleven.  
5 He heard a couple of people in front of  
6 him say I heard something about a meet-  
7 ing on a Fred bus. That was good enough  
8 for him. He said, I don't need to do  
9 any investigation; I'm not a detective.

10 It was done with malice.  
11 It was done to embarrass, to humiliate,  
12 to shame, and to curtail the public  
13 activities of the respondents. It was  
14 done to bully them, and it was an  
15 outrage.

16 Seventeen of the eighteen  
17 counts were clearly wrong as a matter of  
18 law and/or fact. One count has been  
19 sustained, making new law. On these  
20 three that were dismissed, even finally  
21 the petitioners realized we have got to

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1 drop them. And as you will recall, Your  
2 Honor, on the demurrers, what they said  
3 was we are going to have evidence on all  
4 of these things. It never happened;  
5 none of them ever happened.

6 When we asked Shelton  
7 about the meeting involving Maury School  
8 and all these five respondents showed up  
9 at the meeting, you know what he said?  
10 I kind of got it reading between the  
11 lines.

12 We show him the only  
13 e-mail that says Mr. Howson took Mr.  
14 Withers over there alone, the two of  
15 them, because he had never seen it  
16 before. That's all that ever happened.  
17 That's not a meeting. But Mr. Shelton  
18 said, I've just been around a long time,  
19 I know how these things are, and we will  
20 get it in discovery.  
21 It was malicious; it was

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1 abusive. And, Your Honor, we will be  
2 here every 30 days, 60 days, 90 days,  
3 whenever, if we don't put a stop to  
4 this. This is an outrage.

5 You may view -- and the  
6 Court certainly may -- the respondents'  
7 violation, and if I might be permitted,  
8 the most technical, possible violation  
9 of the meeting statute with respect to  
10 Committee Assignments. This is the  
11 exact opposite of that.

12 This was deliberately  
13 used to put the information out, to take  
14 an advertisement out to embarrass and  
15 curtail the activities of these people.  
16 Let me tell you why the petitioners did  
17 it.

18 We asked them in deposi-  
19 tions, who are paying your legal fees?  
20 They refused to answer. They are not  
21 paying them. We don't know what

1 corporation or person in this City is  
2 paying them. You know why they could  
3 file such frivolous charges? It was  
4 free. But, yet, they had the temerity,  
5 the audacity, to ask Your Honor to give  
6 them an award of attorneys fees, which  
7 Your Honor just denied. They aren't  
8 even paying any attorney fees.

9 Don't you think the  
10 citizens of Fredericksburg are entitled  
11 to know, when they are paying 70, 80,  
12 90,000, 100,000 in attorneys fees, who's  
13 paying the attorneys fees for these  
14 people to bring claims that are so  
15 meritless, that they withdraw them  
16 themselves?

17 We ought to be paid. The  
18 taxpayers ought to be reimbursed for  
19 every dime we had to spend defending  
20 against these scurrilous, baseless  
21 charges.

1 THE COURT: Do you agree your  
2 motion only goes to 15, 16, and 18?

3 MR. STAHL: That is correct,  
4 Your Honor.

5 MR. SOKOL: Your Honor, may I  
6 introduce myself into the case with  
7 respect to respondents' pleas?

8 THE COURT: Yes, Mr. Sokol.

9 MR. SOKOL: When we filed our  
10 motion to dismiss at the outset, we  
11 asked for the imposition of sanctions.  
12 When we filed our answer, we renewed  
13 that motion that sanctions be imposed.

14 Your Honor is well aware  
15 that section 8.01-271.1 says that once a  
16 pleading has been filed, that the person  
17 filing the pleading vouch that it is  
18 well, among other things, well-grounded,  
19 the adjective well-grounded, in fact.

20 Mr. Withers is a member  
21 of Council. He is also an individual.

1 When he receives a pleading that con-  
2 tains 18 counts, 17 of which refers  
3 specifically to him and where he is  
4 charged with having willfully violated  
5 the law, it has a major impact upon him.

6 It has a major impact in  
7 a larger sense upon the community  
8 because this petition is a public  
9 record. It is reported; it is reported  
10 extensively and is well read. And it  
11 tells the citizens of this community, it  
12 tells his constituency, the citizens of  
13 this region, that he has been a willful  
14 violator of the law in his role as a  
15 public official.

16 Now, it's interesting the  
17 one count from which he was excluded;  
18 the Dogwood count. Apparently they made  
19 some inquiry about Dogwood and found  
20 that Mr. Withers and Mr. Fortune were  
21 not present and they weren't included in

1 that count.

2 But look at the counts  
3 Mr. Withers was included; and the most  
4 dramatic, the most disgusting, the one  
5 that is utterly baseless, is this  
6 so-called Fred bus count.

7 Now, look what they  
8 charged Mr. Withers with on the Fred  
9 bus; Count 16. It says that Mr. Withers  
10 boarded that bus separately; it says  
11 that he left the bus separately. There  
12 are some specific, factual allegations  
13 that he entered that bus sometime  
14 between July 15 and August 15; and they  
15 said the reason that this sinister entry  
16 and this sinister departure from the bus  
17 was so that a consensus could be reached  
18 before meeting with Councilman Wilson  
19 and Councilman Turner; and the intent  
20 was to get on this bus, not being  
21 detected getting on as a group, not



1 being detected getting off as a group,  
2 and leave Mr. Turner off the bus --  
3 Reverend Turner, excuse me -- and leave  
4 Councilman Wilson off the bus.  
5 That's a pretty serious  
6 thing when Mr. Withers has run for  
7 public service as a person of inclusion.  
8 That's what he has been telling his  
9 constituency for months, and now these  
10 petitioners say you are a fraud; you are  
11 a hypocrite, Mr. Withers.  
12 But then we took Mr.  
13 Shelton's deposition, and I won't even  
14 speak to the deposition of Timpone and  
15 Jenkins because they shed nothing on it  
16 whatsoever, except that the proof will  
17 come by and by. By and by has come and  
18 gone.  
19 But the transcripts of  
20 the Shelton deposition will reveal that  
21 I showed Mr. Shelton a newspaper

1 article. First I asked him whether he  
2 signed onto the petition, and I asked  
3 him if he got The Free Lance-Star and if  
4 he read The Free Lance-Star? And you  
5 will see that in the transcripts, and he  
6 allowed that he did.  
7 Then I showed him this  
8 article, August 11th, front page, back  
9 page, replete with pictures. The back  
10 page I showed him, and it's in the  
11 transcript, and I asked him to identify  
12 who is in the picture of the men on the  
13 bus, the persons on the bus. And there  
14 is Mr. Withers on the bus; and Mr.  
15 Shelton says, and there is Mr. Wilson.  
16 There is Councilman Wilson, the person  
17 that he alleged and Mr. Timpone swore to  
18 in his affidavit was excluded. That was  
19 the reason they had this meeting, was to  
20 keep these guys off the bus. But there  
21 he is, Mr. Wilson, right next to my man

1 Mr. Withers. And right across the aisle  
2 looking over toward Mr. Wilson and Mr.  
3 Withers is Mr. Turner.  
4 Now upon reasonable  
5 inquiry prior to late September -- this  
6 is six weeks before they filed the peti-  
7 tion -- here is this article, and here  
8 is this picture, and here is this plead-  
9 ing. It is an outrage.  
10 I called in the original  
11 motion to dismiss, that allegation that  
12 there was a secret meeting to discuss  
13 the Homeless Shelter -- it had been  
14 surreptitiously set up when Fortune  
15 whispered something to a couple others,  
16 they said, and then it was held at some  
17 future date -- I called it an hallucina-  
18 tion. They dropped that one later on  
19 because they had nothing, absolutely  
20 zero.  
21 And to support this

1 second charge built on the first charge  
2 of secret meetings, face-to-face secret  
3 meetings, they started the Maury School  
4 count as an e-mail count. Your Honor  
5 struck that one. And then, when they  
6 had an opportunity to look into it after  
7 it had been struck, what did they do?  
8 They wanted to resuscitate it and they  
9 resuscitated it by saying it is not an  
10 e-mail anymore, it's a meeting at Maury.  
11 That meeting of three or  
12 more members never happened, and they  
13 ought to have known in time that reason-  
14 able inquiry, and with sufficient time  
15 allowed to make that inquiry, would have  
16 revealed that.  
17 Now, these e-mail counts.  
18 They have boxes this wide of e-mails  
19 that they got from the Virginia Freedom  
20 of Information Act. They saw in the  
21 boxes that Mr. Withers did absolutely

1 nothing, zero; and, yet, they included  
2 him on each and every count as engaging  
3 in a continuous effort to exclude two  
4 other councilmen through his use of  
5 e-mail. No basis in fact, when they had  
6 the hard proof of the e-mails in front  
7 of them, to do that.

8 Now, I don't disagree  
9 with the fact that this Code Section  
10 should be used sparingly, but its needs  
11 to be used when the processes of justice  
12 and the process of civil litigation are  
13 so abused, and particularly so in the  
14 case of public officials who are out  
15 there as a target. They don't have much  
16 protection under laws of defamation.  
17 They are out there for public service,  
18 but the dissemination of information  
19 about their activities is vast dissemi-  
20 nation among the community.

21 And when they are charged

1 with being a violator, it is hurtful to  
2 them as officials; it's hurtful to them  
3 as individuals. They have feelings.  
4 They don't lose their sensitivity by  
5 reason of the wisdom of the public in  
6 electing them. And what it does, what  
7 it does if it's permitted to continue,  
8 is to chill the interest by many people,  
9 well qualified by honesty and by  
10 intelligence and otherwise, to serve; to  
11 say we are not going to get into this  
12 crucible, we are going to get into this  
13 arena.

14 And this is the kind of  
15 litigation that can, that can, produce  
16 that kind of deleterious, that kind of  
17 pernicious result, unless somebody steps  
18 in and says you are not going to do it  
19 without paying if I find this petition  
20 is not well-grounded in facts.

21 And I think there should

1 be -- attention should be drawn to the  
2 fact that Mr. Withers in 17 counts has  
3 been charged on an utterly irresponsible  
4 and reckless basis; and, therefore, I  
5 ask that Your Honor impose sanctions by  
6 way of an award of attorneys fees.

7 We are not asking for any  
8 reimbursement of costs insofar as Mr.  
9 Withers is concerned, because the only  
10 costs he has are attorneys fees. Thank  
11 you.

12 THE COURT: Mr. Kaufman?

13 MR. KAUFMAN: You know, Your  
14 Honor, this wasn't noticed for today and  
15 since I didn't know we would be arguing  
16 this until I walked in here today, the  
17 reason you don't have a response to the  
18 weighty brief in support of their motion  
19 for sanctions is because I thought I had  
20 more time to file it and was preparing  
21 for the underlying case. Nonetheless,

1 let me respond and proffer as best I  
2 can.

3 In the first place, I'm  
4 not quite sure how to respond to Mr.  
5 Sokol's extended plea, you know, for  
6 Mr. Withers because it sounded more like  
7 he was making a plea in a defamation  
8 case than as it applies to these three  
9 counts that are at issue here. But let  
10 me also point out that sanctions are  
11 applicable when there has not been a  
12 good-faith effort to extend the law.

13 Now the Court in this  
14 case, starting at the beginning, made  
15 law in two different ways. In its  
16 original demurrers, the Court ruled for  
17 the first time in the Commonwealth of  
18 Virginia that FOIA did not apply until  
19 you had been sworn in. Now, that elimi-  
20 nated nine counts.

21 Now, those nine counts

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1 relied on, you know, a Florida case and  
2 other states had disagreed with it, and  
3 we believed Florida was more appropri-  
4 ate. That's not sanctionable. That is  
5 a matter of law, the Court ruled. It  
6 was the first time it was addressed in  
7 Virginia.

8 For the other nine  
9 counts, you know, they were pled and the  
10 Court dismissed several of them here  
11 and, you know, the Court ruled on sum-  
12 mary judgment on the e-mails on a number  
13 of those.

14 As for Mr. Withers, we  
15 believed that the internal evidence of  
16 the e-mails, particularly on the Commit-  
17 tee Assignment e-mail, the fact that  
18 Mr. Withers was reading and responding  
19 to that e-mail discussion, by picking up  
20 the phone and calling Mayor Beck,  
21 included him in that count.

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1 We also believed that the  
2 repeated requests -- like, there was a  
3 P.S. in one count reminding both Dr.  
4 Fortune and Mr. Withers about the  
5 Celebrate Virginia and they should get  
6 their comments in promptly -- would  
7 indicate to the Court that he was read-  
8 ing and absorbing and using the material  
9 even if he wasn't actively speaking.

10 And the analogy I think I  
11 used earlier was one of going to a City  
12 Council meeting and sitting there and  
13 listening carefully but not asking  
14 questions or commenting on the business  
15 being discussed.

16 The Court ruled on that.  
17 This is a reasonable good-faith argument  
18 for the e-mails. There is nothing  
19 sanctionable there.

20 And Mr. Withers wasn't  
21 mentioned in the others and that's why

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1 there is no motion for sanctions on  
2 these others, you know, despite the  
3 outrage and the table-thumping and  
4 everything like that. We are faced with  
5 motions for sanctions on three counts.

6 Now, the Maury count,  
7 there is an e-mail in there which the  
8 Court has seen, which I cannot produce  
9 as I stand here because I didn't bring  
10 it with me to go all the way. But there  
11 is an e-mail in there which the Court  
12 has seen, which essentially is from  
13 Mr. Howson to everybody saying, Billy  
14 has never seen Maury and asked me to  
15 take him; how many of you want to come?

16 I mean, there is a series  
17 of e-mails from Dr. Fortune saying he  
18 would like to come but Friday is the  
19 only day he can make it. Mr. Kelly said  
20 that he wanted to try and come. Friday  
21 afternoon turned out not to be good, so

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1 Mr. Fortune couldn't come. And then  
2 there is an e-mail which goes something  
3 along the lines of well -- from Mr.  
4 Howson to everybody, well, I'm going to  
5 take Billy there on Saturday, and we  
6 don't know if Mr. Kelly is coming or  
7 not; there has been no response from  
8 Mr. Kelly on that.

9 Again, I regret that I  
10 didn't bring those to pass them out, but  
11 opposing counsel have seen these. They  
12 were all in the e-mails that were pro-  
13 duced by the City to us and which we  
14 have gone through and examined, which we  
15 had grounds for thinking, well, maybe  
16 Dr. Fortune had been able to go on  
17 Saturday after all, or maybe Mr. Kelly  
18 had come by, which it turned out they  
19 didn't.

20 And when it turned out  
21 that that didn't happen, we dismissed

1 things with prejudice; but we had a  
2 reasonable belief, based on the e-mails,  
3 that they had gotten together and gone.  
4 We wanted to find out. That's not  
5 sanctionable.

6 As for the Fred bus  
7 meeting, well, there was actually a Fred  
8 bus trip that people went on, and they  
9 got on and they got off, and they looked  
10 at developments and this and that and  
11 the other. And it took us a while to  
12 figure out that the Fred bus meeting  
13 was, in fact, the August 7th trip to  
14 Dogwood. It took us quite a while to do  
15 that.

16 And there was this one  
17 e-mail that had us running around pretty  
18 good there and was an e-mail again that  
19 tied into an e-mail involving Mr.  
20 Withers and the trip to Maury. So there  
21 is a line in there about -- from Mr.

1 Howson to everybody saying after talking  
2 to all of you on the bus, I have changed  
3 my plans, etcetera, etcetera.

4 I don't know if the Court  
5 recalls that one; and, again, I apolo-  
6 gize to the Court for not having it  
7 instantly to hand you. But that is  
8 there, they have seen it; and, in fact,  
9 I think they used it at one point for  
10 something. So we made -- we had the  
11 basis for going forward with discovery  
12 on what that was. We didn't realize  
13 that that was the trip that Dogwood had  
14 sponsored, that everybody went on.

15 Once we determined exact-  
16 ly what it was we were dealing with, we  
17 dismissed the count with prejudice. It  
18 is not sanctionable to dismiss a count  
19 with prejudice after you have concluded  
20 that it was innocent. We had a basis  
21 for going forward and we went forward.

1 We investigated and we dismissed it.  
2 Now the September 17  
3 count -- and again, unfortunately, I was  
4 compiling material for everything that  
5 was going on here in the sanctions, and  
6 I will proffer this to the Court, you  
7 know.

8 But there is a document  
9 which we produced to the other side  
10 Bates stamped 2829, and it is a memo  
11 from Mr. Howson and Mr. Fortune. The  
12 subject is Goals Memo. And he talks  
13 about getting across the idea that they  
14 have to decide what they are trying to  
15 accomplish before they start making  
16 decisions about what they are going to  
17 do. That date is September 12.

18 September 17 is a Council  
19 work session and there is a notation in  
20 there -- and those notes were also pro-  
21 vided as part of the discovery packet,

1 3809, etcet, that they have -- that  
2 Mr. Fortune asked for a meeting to  
3 discuss priorities. When you discuss  
4 priorities, you discuss your philosophy  
5 in terms of setting what you are going  
6 to do similarly. Now compounded by  
7 that, although it wasn't mentioned, I  
8 don't think, by Mr. Stahl, you know, we  
9 did have additional information like  
10 that.

11 A woman named Susan  
12 Spears, who I think they mentioned  
13 earlier, talking to one of my clients,  
14 and this is a few days after the  
15 September 17 meeting and before we filed  
16 the lawsuit, and she had heard that they  
17 were doing something. My clients didn't  
18 follow-up on that, but I did. And I  
19 talked with Ms. Spears about where did  
20 she get her information there; and she  
21 talked with Mr. Bolinger a couple days

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1 after the thing and her source was  
2 Mr. Bolinger.  
3 Now, reasonable good  
4 faith? Mr. Bolinger is at the table,  
5 sitting right there. I have got an  
6 e-mail from Mr. Howson and Mr. Fortune  
7 saying we need to discuss the philosophy  
8 so we know -- so we can decide what to  
9 do; Dr. Fortune saying we need to have a  
10 priority thing, which seems to me to be  
11 a follow-up. And we had the note in the  
12 court notes -- not the Court notes, I'm  
13 sorry -- in the Council notes, the draft  
14 that was produced as part of the FOIA,  
15 and I followed up with Mr. Bolinger. It  
16 was a reasonable, good-faith investiga-  
17 tion.  
18 Now, as it turned out, we  
19 filed this lawsuit the 25th or 26th of  
20 September. Of course, the minute we  
21 filed it, that obviated the chance that

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1 there would be that meeting. I suppose  
2 I could have waited and trapped them in  
3 it, but I chose not to. But we had a  
4 reasonable good-faith belief, so none of  
5 this is uninvestigated.  
6 Oh, by the way, I should  
7 add when it became apparent that we had  
8 precluded everything by filing the  
9 investigation on that count, the meeting  
10 at the end of September and that it  
11 hadn't happened, we dismissed it with  
12 prejudice. Okay; fine. We thought it  
13 was going to happen; we filed and in  
14 part stopped it from happening. It  
15 didn't happen; fine, close it out,  
16 dismissed with prejudice.  
17 None of this is sanction-  
18 able, Your Honor. We had reasonable  
19 good-faith belief for every one of these  
20 things.  
21 Now, since I didn't come

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1 here today with the multitude of extra  
2 copies and information and sworn affi-  
3 davits because I didn't expect to be  
4 arguing it today, but that's what we are  
5 going to produce and show if you con-  
6 tinue this. These documents are here.  
7 I have to get extra copies cited to them  
8 and I have to look for the e-mails. I  
9 can get them for the Court; the other  
10 side has already seen them. I can call  
11 Mr. Bolinger up, you know, but that's  
12 what is going to happen.  
13 We investigated. This is  
14 what I was told. None of this is sanc-  
15 tionable, not unless you are going to  
16 sanction us for Mr. Sokol's plea on  
17 behalf of Mr. Withers, you know, that he  
18 had a bad time. And then the Court said  
19 no, you know, even though you read all  
20 these e-mails, you didn't respond by  
21 e-mail so you are not part of it, even

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1 though you responded by telephone call  
2 and they expected that you would.  
3 And there is another pri-  
4 vate e-mail in there in the committees  
5 section here from Mr. Beck, Mayor Beck  
6 to Mr. Withers saying, look at this and  
7 give me a phone call or give me a call.  
8 It seems to be an inference in there  
9 from that, that they knew he wasn't  
10 going to e-mail back.  
11 But the Court has ruled  
12 on that, but the Court might have ruled  
13 the other way. None of this is sanc-  
14 tionable. None.  
15 THE COURT: All right. Let me  
16 ask you this, and I'm going to be very  
17 candid with you. The Court is quite  
18 concerned in reference to the allega-  
19 tions of the Maury visit and the bus  
20 trip.  
21 MR. KAUFMAN: Yes, sir.

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1 THE COURT: I did want to  
2 resolve all matters in reference to this  
3 litigation today. And having told you  
4 what I just got through telling you, how  
5 long will it take you to gather whatever  
6 it is that you would like to present in  
7 reference to the issue of sanctions as  
8 to those -- especially to those two  
9 counts?  
10 MR. KAUFMAN: Maury and the  
11 Fred bus?  
12 THE COURT: Yes.  
13 MR. KAUFMAN: On Maury I can  
14 find the e-mails over the weekend. And  
15 the Fred bus, there -- let me check with  
16 counsel, check with co-counsel just a  
17 second.  
18 THE COURT: How about Tuesday,  
19 if that is clear with counsel? Maybe  
20 only one attorney need attend. I'm just  
21 suggesting that.

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1 MR. KAUFMAN: I can be here.  
2 MR. STAHL: What time would be  
3 the Court's convenience?  
4 THE COURT: The civil cases  
5 that were set for Tuesday are settled,  
6 so we have the entire day, I believe.  
7 Well, one moment.  
8 I have got one case  
9 settled and there was a second -- Yes,  
10 we have the whole day.  
11 MR. KAUFMAN: I'm at the  
12 Court's disposal.  
13 MR. STAHL: Your Honor, I will  
14 be out of the country, but Mr. O'Connor  
15 thinks he could do it if it were earlier  
16 in the day.  
17 THE COURT: We could make it  
18 earlier in the day. Can we do that?  
19 MR. KAUFMAN: I'm here.  
20 THE COURT: Mr. Barnsback, is  
21 that okay?

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1 MR. BARNSBACK: I cannot, Your  
2 Honor, and I don't want the Court to  
3 interpret my absence as anything other  
4 than I'm stuck in Charlottesville in  
5 depositions that day.  
6 THE COURT: No, I understand.  
7 Given the fact that the City is paying  
8 such a high legal bill, maybe one  
9 attorney would be appropriate since it's  
10 just the issue of sanctions.  
11 MR. STAHL: And to make it  
12 even cheaper, I will send the youngest  
13 one.  
14 THE COURT: Thank you, Mr.  
15 Stahl.  
16 If you are traveling, how  
17 about 10:00 o'clock, if that is per-  
18 missible?  
19 MR. O'CONNOR: 9:00 works for  
20 me. I can do 9:00, Your Honor.  
21 MR. KAUFMAN: Then it's the

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1 Court's choice.  
2 THE COURT: Okay; then  
3 9:00 a.m, Tuesday morning.  
4 MR. KAUFMAN: Just for clari-  
5 fication, it's only on the issue of the  
6 Fred bus and on Maury?  
7 THE COURT: Those counts  
8 disturb the Court greatly.  
9 Mr. Stahl, you needn't  
10 comment.  
11 MR. STAHL: Your Honor, will  
12 we have an opportunity to put in any  
13 other papers?  
14 THE COURT: Yes, if you wish.  
15 I have read the depositions. I've read  
16 your documents.  
17 MR. STAHL: Yes, Your Honor.  
18 But when the petitioners put in whatever  
19 they are intending to put in, if we  
20 could get that a little bit -- I know  
21 it's on short notice, but if we could

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1 get it Monday morning, then we could  
2 have Monday during the day to analyze it  
3 and perhaps offer the Court our  
4 observations.  
5 THE COURT: Can you get what-  
6 ever you are talking about in to the  
7 respondents on Monday at a reasonable  
8 time?  
9 MR. KAUFMAN: We will do  
10 everything we can, Your Honor, but I --  
11 I will do everything I can.  
12 MR. SOKOL: Your Honor, may I  
13 ask just by way of clarification, did  
14 you find a certain congruity among all  
15 the Council members, so that Mr.  
16 Withers' motion is neither stronger nor  
17 weaker than those of the others; is that  
18 what you concluded?  
19 THE COURT: Yes.  
20 MR. KAUFMAN: Your Honor, one  
21 more thing.

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1 THE COURT: Mr. Sokol, I'm  
2 sorry. Can you be here on Tuesday?  
3 MR. SOKOL: I thought you were  
4 telling me to be elsewhere.  
5 THE COURT: You will be  
6 represented well.  
7 MR. SOKOL: I will ask Mr.  
8 Beck.  
9 MAYOR BECK: I would love to  
10 have you here.  
11 MR. SOKOL: Thank you.  
12 I will be here, Your  
13 Honor.  
14 MR. STAHL: They're with the  
15 young group again, Your Honor.  
16 MR. KAUFMAN: Your Honor, a  
17 point of clarification? Have you ruled  
18 against us on attorneys fees? I'm not  
19 sure whether you did that or not.  
20 THE COURT: I haven't. I am.  
21 MR. KAUFMAN: Thank you.

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1 THE COURT: Mr. Stahl, would  
2 you note that, as well. The petition  
3 for attorneys fees on behalf of the  
4 petitioners is denied.  
5 MR. STAHL: Thank you, Your  
6 Honor.  
7 MR. O'CONNOR: Your Honor, we  
8 have the three petitioners subpoenaed  
9 for today and we just want to clarify  
10 that they will be available Tuesday? We  
11 may want to call them, depending on what  
12 petitioners do with their documentary  
13 evidence.  
14 THE COURT: All right. Could  
15 you check with your clients --  
16 MR. KAUFMAN: (interjecting) I  
17 can proffer to the Court what we are  
18 going to produce.  
19 MR. STAHL: We would like to  
20 see it first, Your Honor.  
21 THE COURT: Would you check

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1 with your clients to see if they are  
2 available Tuesday morning.  
3 MR. KAUFMAN: Let me ask them.  
4 Your Honor, they will be  
5 here.  
6 THE COURT: All right; they  
7 will be present.  
8 Mr. Stahl, you are going  
9 to prepare the order in reference to  
10 today, and Mr. Kaufman is going to give  
11 you input as to what he specifically  
12 wants in reference to Count 17 -- I'm  
13 sorry -- Count 11.  
14 MR. KAUFMAN: Yes, Your Honor.  
15 MR. STAHL: We will do that  
16 promptly, Your Honor, in conjunction  
17 with Mr. Sokol.  
18 THE COURT: Let me ask, other  
19 than the issue as to sanctions, if that  
20 in fact, concludes this matter?  
21 MR. STAHL: Your Honor, we

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1 may -- we may -- I need to speak with my  
2 clients, but we might approach Your  
3 Honor with a motion to reconsider on  
4 Count 11.  
5 THE COURT: All right. Does  
6 that conclude, at least for today, all  
7 matters that should have been considered  
8 today, Mr. Kaufman?  
9 MR. KAUFMAN: For today; yes,  
10 Your Honor.  
11 THE COURT: Have a seat,  
12 gentlemen. Have a seat, Mr. Kaufman.  
13 MR. KAUFMAN: Yes, Your Honor.  
14 THE COURT: This Court --  
15 frankly, because of a Saturday newspaper  
16 article and not because litigation had  
17 been filed -- has reviewed each and  
18 every e-mail that was sent from one  
19 Council person to another. This Court  
20 has read numerous briefs and motions,  
21 and I want to personally thank counsel

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1 for what I'm going to call keeping the  
2 politics by and large -- there were a  
3 few exceptions -- out of these proceed-  
4 ings.  
5 This Court negated by its  
6 ruling the first nine counts of this  
7 petition. But the information that was  
8 contained in those e-mails which dealt  
9 with those first nine counts caused this  
10 Court a great deal of concern, and I am  
11 not going to be specific.  
12 The citizens of this  
13 community have been very fortunate in  
14 reference to their elected leaders.  
15 Last year we appeared here and the Court  
16 made a statement that it was time to  
17 come together and, in essence, for the  
18 good of this community move on and do  
19 what was best for this community. It is  
20 still time for that to occur. In fact,  
21 the citizens of this community should

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1 receive no less.  
2 Whatever the motivation,  
3 whatever the reason, it is time for our  
4 public officials to compromise or dis-  
5 cuss their differences; compromise when  
6 they can and appropriately disagree when  
7 they have to.  
8 I would hope that, hope  
9 that, one year hence we don't end up in  
10 this courtroom doing something similar  
11 to what has occurred today. And,  
12 frankly, on behalf of the citizenry of  
13 this community, I sincerely hope that  
14 you will not wish and will take those  
15 steps that are necessary so that we  
16 don't end up here one year hence.  
17 Court is adjourned to  
18 9:00 a.m. Monday morning.  
19 MR. O'CONNOR: Tuesday  
20 morning, Your Honor?  
21 THE COURT: No, court is

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1 adjourned until 9:00 a.m. Monday  
2 morning.  
3 MR. KAUFMAN: Thank you, Your  
4 Honor.  
5 MR. SOKOL: And we will be  
6 here on Tuesday, Your Honor.  
7 THE COURT: Thank you, Mr.  
8 Sokol.  
9 -----  
10 HEARING CONCLUDED AT 4:05 P.M.  
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1 CERTIFICATE OF COURT REPORTER

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I, Ann B. DeShazo, hereby certify that  
I, first being duly sworn, was the Court Reporter  
in the Circuit Court of the City of  
Fredericksburg, Virginia, on December 13, 2002, at  
the time of the hearing herein.

I further certify that the foregoing  
excerpt is a complete and accurate record of the  
proceedings herein, constituting Volume II, of the  
case entitled Gordon Shelton, et al, Petitioners,  
vs. Bill Beck, Mayor, et al, Respondents.

Given under my hand this 14th day of  
December, 2002.

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Ann B. DeShazo  
Court Reporter & Notary Public

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