

V I R G I N I A

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

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EILEEN M. McLANE, FAIRFAX COUNTY :

ZONING ADMINISTRATOR, :

Plaintiff, :

vs. : Case CL-2010-11285

ROSA MARTINEZ, :

Defendant. :

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Fairfax, Virginia

Friday, December 10, 2010

The above-entitled matter came on to be heard before the HONORABLE R. TERRENCE NEY, in and for the Circuit Court of Fairfax County, 4110 Chain Bridge Road, Courtroom 5E, Fairfax, Virginia, beginning at approximately 10:54 o'clock a.m. when there were present on behalf of the respective parties:

APPEARANCES:

On behalf of the Plaintiff:

CHRIS COSTA, ESQUIRE

On behalf of the Defendant:

RICHARD H. NGUYEN, ESQUIRE

## P R O C E E D I N G S

(The Court Reporter was sworn by the Court.)

MR. COSTA: Good morning, Your Honor. It's my motion so I'll just briefly say my name is Chris Costa for Eileen McLane, the plaintiff. It's a zoning administration matter, zoning violation matter.

THE COURT: Okay. I'm trying to figure out exactly what's going on here. Is Ms. Martinez still in violation? Is she non-compliant?

MR. COSTA: Yes, Your Honor.

THE COURT: How do I know that?

MR. COSTA: That she's still non-compliant?

THE COURT: Yes, sir.

MR. COSTA: My understanding is that, well, from discussions with counsel, they are not disputing the conditions that we say lead to the violations, have not changed. They're simply challenging as to whether or not they're violations, as far as I understand it, and I think that that's a collateral attack to something that they couldn't appeal before the BZA.

THE COURT: Okay. Well, let me hear from Mr. Nguyen.

MR. NGUYEN: As to that specific statement,

1 Your Honor -- Rich Nguyen for the defendant. Mr.  
2 Costa's testimony as to any statements I make are not  
3 found in the pleadings, orders or admissions of this  
4 case. Mr. Costa, the plaintiff's burden is to prove  
5 by --

6 THE COURT: Well, let me frame the issue as  
7 it is in my mind before we get to the appeal period and  
8 so forth and so on and the collateral attack aspect. We  
9 still are here on summary judgment and if Ms. Martinez  
10 has corrected these matters or addressed these matters  
11 or done something about these matters, then I can't  
12 imagine how I can grant summary judgment. Even though  
13 it may be procedurally correct in every respect, it  
14 would be substantively wrong in the most important  
15 respect.

16 What is your response?

17 MR. COSTA: May I respond?

18 THE COURT: Well, my question is to Mr.  
19 Nguyen initially.

20 MR. COSTA: Oh, thank you.

21 MR. NGUYEN: Yes, Your Honor. In our answer,  
22 she's denied that these violations as alleged have  
23 continued. She denies that they are currently in

1 violation. That is one matter and a factual issue  
2 generally disputed.

3 THE COURT: She's made matters better or  
4 she's done what she's required? I mean this is what  
5 she alleges and expects to prove?

6 MR. NGUYEN: Yes, Your Honor. She has  
7 alleged that she is no longer in violation and we'll  
8 prove that at trial if given the opportunity, yes, Your  
9 Honor.

10 THE COURT: Okay, then let me back up to the  
11 other matter. Don't go away because on this, for the  
12 reasons stated, I think that you have it better on that  
13 aspect but the other aspect is is that when she was  
14 noticed for the violations, she had the opportunity to  
15 appeal and apparently she never did prosecute the  
16 appeal and Mr. Costa is going to rise and tell me that  
17 the case is over.

18 How do you respond to that? Am I correct?

19 MR. COSTA: Yes, Your Honor, but we also  
20 still challenge the other allegation about the  
21 ongoing --

22 THE COURT: Well, let's listen to this part.  
23 Okay.

1 MR. COSTA: Yes.

2 THE COURT: Yes, sir?

3 MR. NGUYEN: If I may address that, Your  
4 Honor. It's set forth in our pleadings as well, Your  
5 Honor.

6 THE COURT: You just tell me, though.

7 MR. NGUYEN: Yes, Your Honor. Under the  
8 Fairfax County zoning ordinance; it sets forth the time  
9 of appeal required for the BZA appeal where it's --

10 THE COURT: Well, if it's ten minutes or it's  
11 ten years, she did not file an appeal, correct?

12 MR. NGUYEN: To this point, Your Honor, she  
13 has acknowledged that no appeal has been filed.

14 THE COURT: All right. So how do we get  
15 around it?

16 MR. NGUYEN: Yes, Your Honor. I have copies  
17 of the pertinent zoning ordinance, Your Honor. And the  
18 first one is 18-901, section 3. And Your Honor, it's  
19 attached to my response brief.

20 And if you look at this, Your Honor, look at  
21 that the last sentence of paragraph 3, it states that  
22 the appeal period shall not commence until such  
23 statement is given, that being the statement of the ten

1 days. And based on really whether or not the notice of  
2 violation was compliant with this statute, with this  
3 ordinance, is not an issue for today, but it had been  
4 made an issue in our pleadings and we deny that that  
5 notice of violation is in compliance with this.

6 To continue, one of the violations that  
7 requires a ten day notice is specifically what the  
8 notice of violation cites, section 2-502 which is  
9 entitled "Limitation of the Occupancy of a Dwelling  
10 Unit." I have copies of that if Your Honor doesn't.

11 THE COURT: Keep going.

12 MR. NGUYEN: Yes, Your Honor. And that  
13 clearly states that it's a ten day appeal period.  
14 And going back to the previous ordinance, it states  
15 that the notice of violation shall, which is mandatory  
16 language which is further bolstered in its mandatory  
17 nature by the statement that the appeal period shall  
18 not commence until such statement is given.

19 If that last sentence wasn't there, plaintiff  
20 could make the argument that there is no prohibitory  
21 language, any language cutting off rights if that  
22 statement isn't given. I believe the case on point in  
23 that is the Jamborski case and that line of cases.

1 Again, that specific issue isn't offered today but  
2 that's where we're taking this argument.

3 And Your Honor, I would like to hand up --  
4 this morning, in preparing my argument, I did have an  
5 opportunity to go on the Board of Zoning Appeals  
6 website and I would ask the Court to take judicial  
7 notice of this under Virginia Code 8.013 and 6, Your  
8 Honor. And if I may, bit of a last minute thing, but  
9 I'll show it to Mr. Costa.

10 MR. COSTA: Do you have a copy of the code  
11 section?

12 MR. NGUYEN: I do.

13 MR. COSTA: Great.

14 (Mr. Nguyen handed documents to Mr. Costa and  
15 to the Court.)

16 MR. NGUYEN: Your Honor, based on the essence  
17 of a print-out of the web page of the Board of Zoning  
18 Appeals who I believe is associated if not the same  
19 party with plaintiff itself, Your Honor, based on that,  
20 the Court can take judicial notice of the plaintiffs or  
21 their associated bodies of politics.

22 Their own statement that under timely filing,  
23 Your Honor, you'll see there, it cites exactly what

1 I've argued in my brief.

2 THE COURT: Well, tell me where I'm supposed  
3 to see it.

4 MR. NGUYEN: Yes, Your Honor. If you see  
5 time of filing, directly below that it says section  
6 18.303, sets forth the time limits of filing appeals.

7 THE COURT: Right.

8 MR. NGUYEN: And the next sentence states  
9 appeals for notices of violation involving the  
10 following violations shall be filed within ten days  
11 from the date in accordance with submission  
12 requirements.

13 THE COURT: Right.

14 MR. NGUYEN: That sentence, which is item  
15 number 1 in section 2502 which is exactly what we're  
16 speaking about. I was very surprised to find this this  
17 morning, but I think it does enlighten the Court as to  
18 the correctness of the defendant's argument.

19 The other question is at this point, is that  
20 at issue? It will be an issue.

21 THE COURT: Well, what did the County fail to  
22 do?

23 MR. NGUYEN: Give the ten day notice of

1 violation, ten day notice for an appeal to the BZA when  
2 it's specifically stated that they shall give that  
3 notice and that the appeal period shall not run --

4 THE COURT: You mean there was a notice of  
5 violation posted that did not contain the language  
6 about the appeal?

7 MR. NGUYEN: That's correct, Your Honor. It  
8 contained the incorrect statement in violation of  
9 18.901 section 3, Your Honor.

10 THE COURT: There was no language whatsoever  
11 about ten days?

12 MR. NGUYEN: It's the language --

13 THE COURT: There was no language whatsoever  
14 about an appeal?

15 MR. NGUYEN: There was no language about ten  
16 days.

17 THE COURT: What language was there about any  
18 time period?

19 MR. NGUYEN: It stated thirty days, Your  
20 Honor. And the 18.901 section 3 specifically carves  
21 out the conditions where you can give thirty days  
22 notice or ten days notice, and we're stating that that  
23 mandatory language -

1           THE COURT: Doesn't your argument lose some  
2 of its heft since she did not file within thirty days  
3 either?

4           MR. NGUYEN: And Your Honor, that goes to the  
5 next argument. Again, I don't believe this is an issue  
6 for summary judgment, but again, I'll bring it to the  
7 Court's attention since the Court has asked. It goes  
8 into the Alward line of cases and this has again been  
9 pled and argued in the context of a demurrer which is  
10 not, again, the same hearing as today.

11           And that's to say that never having appealed  
12 would have then triggered the likelihood or the  
13 possibility of a declaratory judgment under the Alward  
14 line of cases. As Your Honor knows, a declaratory  
15 judgment is a very limited statutory right that's not  
16 available when issues or facts are in dispute. It's  
17 only available when facts are contained in written  
18 documents, contained in writings and the Court can then  
19 determine the rights of the parties in its writings.

20           Where the plaintiff has failed in that, we  
21 believe, is that the determination of fact in that  
22 notice of violation has not yet been reduced to a  
23 writing due to the fact that under the ordinance I

1 cited and the Alward line of cases, the time period for  
2 filing an appeal for the BZA has not yet expired, it  
3 has not yet even begun.

4 To this day, my client could file an appeal.  
5 She could file it immediately and then --

6 THE COURT: And why is that so?

7 MR. NGUYEN: Because the time period, under  
8 18.901 --

9 THE COURT: Since the time period was given  
10 incorrectly, there's no time period? That's your  
11 argument?

12 MR. NGUYEN: It has not begun yet, Your  
13 Honor. And that's clear to me under 18.901. And  
14 again, that's an issue at trial that we believe will be  
15 argued and briefed at another date.

16 THE COURT: I don't have 18.901 before me.

17 MR. NGUYEN: I have it here, Your Honor, if I  
18 may. And I believe it's attached to my response. It's  
19 section 3, the very last section of section 3.

20 (Mr. Nguyen passed a document up to the  
21 Court.)

22 The paragraph starting with any is what I'm  
23 citing, Your Honor.

1 THE COURT: But such a statement was given,  
2 it just had the wrong time period.

3 MR. NGUYEN: Correct, Your Honor. We would  
4 point out that there's clearly a situation where they  
5 say in certain cases a thirty day period shall apply --

6 THE COURT: I understand.

7 MR. NGUYEN: -- that shall be given and then  
8 another one that specifically carves out, we would  
9 argue, when it's at issue with the Court, that the  
10 General Assembly or the drafters of the ordinance  
11 clearly made it mandatory.

12 They carved out the ten day notice  
13 requirement bolstered by a statement that the appeal  
14 period shall not commence until such statement is  
15 given. And that makes it mandatory language that we  
16 have argued, but we intend to argue that at time of  
17 trial or at another hearing that's dispositive on that  
18 issue, which they would argue that for summary  
19 judgment, in light of the fact that inferences are to  
20 be viewed in light favorable to the non-moving party  
21 and that the burden is upon the plaintiff to prove that  
22 there's no material issue of fact in dispute. We do  
23 not believe that's the case.

1           There are clearly material facts in dispute,  
2 namely that the appeal period has expired and that the  
3 violations are not continuing. We clearly put that in  
4 our pleadings and we --

5           THE COURT: Ms. Martinez says she's now in  
6 compliance?

7           MR. NGUYEN: That she's no longer in  
8 violation.

9           THE COURT: All right, thank you, Mr. Nguyen.

10          MR. NGUYEN: Thank you, Your Honor.

11          THE COURT: Mr. Costa? I think I've finally  
12 got it now. I mean I thought that I had it but I  
13 wasn't certain.

14          MR. COSTA: So in my estimation, it sounds  
15 like we have two issues that the Court's considering  
16 to --

17          THE COURT: How can we grant summary judgment  
18 if there is a material fact, you know, any material  
19 fact in issue, and then he says, oh, I fixed it all?  
20 And I think the answer to that -- well, what is the  
21 answer to that?

22          MR. COSTA: The answer to that is that her  
23 response to our allegation in paragraph 16 of the

1 complaint, we say that the property remains in  
2 violation in that paragraph.

3 THE COURT: Uhm-hm.

4 MR. COSTA: Her response to paragraph 16 is,  
5 "I don't know and therefore I have to deny it." Well,  
6 if she doesn't know, then she's saying that she hasn't  
7 done anything to correct it. Therefore, it still  
8 remains --

9 THE COURT: Well, maybe she's done everything  
10 that she thinks is necessary but she doesn't know if  
11 that's sufficient.

12 MR. COSTA: Her response is, "The defendant  
13 is without sufficient knowledge to admit or deny." So  
14 if she's without sufficient knowledge to admit or deny,  
15 I mean she's not saying I deny because that's not the  
16 case. So she's still saying that -- if she is saying  
17 that she has cleared it, then her response, one would  
18 think, in the answer would be denied.

19 THE COURT: Have you not sent an inspector  
20 out to take a look?

21 MR. COSTA: I haven't sent out an inspector  
22 to go out and take a look. I don't know if that's  
23 going to necessarily resolve the case.

1 THE COURT: Well, no, just out of curiosity  
2 because, you know, she's pretty much fixed to be  
3 granted summary judgment, maybe she should be, but if  
4 the situation has been remedied or partially remedied  
5 or she's trying to remedy it, that's what concerns me  
6 more than the collateral attack issue. Although,  
7 there's something to think about there as well.

8 MR. COSTA: Just to remain first with the  
9 allegation that the violations have been fixed, even if  
10 the violations have been fixed after service of the  
11 lawsuit or even after the notice of violation and the  
12 appeals period had expired, the Zoning Administrator,  
13 under Chapter 22 of Title 15.2 of the Virginia Code  
14 would still be entitled -- because she's entitled to  
15 still seek injunctive relief -- would still be entitled  
16 to the prohibitory injunctions.

17 I don't have a case on point here with me,  
18 but I know that Judge Bellows has written on this  
19 recently and found for us on that issue where a  
20 violation was cleared and he still sought prohibitory  
21 injunctions and Judge Bellows agreed that because of  
22 the statutory language that we still were entitled,  
23 that the Zoning Administrator was still entitled to

1 those prohibitory injunctions. I could get that case  
2 for you but, of course, it's Judge Bellows' case and I  
3 understand the binding nature, rather the persuasive as  
4 opposed to binding nature of -

5 THE COURT: Well, whatever Judge Bellows has  
6 to say on any matter, this Court gives great respect to  
7 his opinions and conclusions and I'm happy to have the  
8 benefit of his wisdom on any matter.

9 MR. COSTA: I appreciate it. So it's  
10 something that he recently handed down, I believe,  
11 within the last six months. I've learned about it  
12 within the last six months from a colleague, of course,  
13 in our office.

14 On the other issue of the appeals notice  
15 period, the Virginia Code in 15.2-2311 says how a  
16 notice is to be given and what the appeals statement is  
17 to be. It is a self-executing statute --

18 THE COURT: 15.2-2?

19 MR. COSTA: 15.2-2311.

20 THE COURT: Right.

21 MR. COSTA: Now, there are three paragraphs,  
22 A, B, and C. I don't recall if it's A or B, but it's  
23 one of those two paragraphs. I apologize. I think

1 it's in A.

2 It says a notice of violation shall be  
3 delivered to the defendant at the address in the tax  
4 records and it can be delivered by certified mail or  
5 posted at the address. In this case, it was posted by  
6 a deputy sheriff. We understand that raises that  
7 correct, you know, presumption of correctness.

8 The notice of violation cited three  
9 violations and said you have thirty days to appeal. A  
10 separate part of the Virginia Code is not mandatory but  
11 is permissive and says that if a locality chooses, it  
12 may pass an ordinance that says that certain types of  
13 violations can have an appeals period that's shorter  
14 than the thirty days, only ten. Fairfax has passed  
15 such an ordinance for only certain types of violations,  
16 only one out of the three, for a rooming house because  
17 of the nature of that.

18 THE COURT: Exactly.

19 MR. COSTA: Only one notice of violation was  
20 given, so only one appeals notice was given. And their  
21 argument is, you gave me thirty days to appeal instead  
22 of ten and therefore, you know, we're somehow  
23 prejudiced for the appeals period hasn't begun to run,

1 which does not make any sense. So that's our argument  
2 on that, on that issue, Your Honor.

3 The Virginia Code doesn't make the ten days  
4 mandatory, it says that the locality can impose such a  
5 shorter period if it wishes to and we have.

6 THE COURT: Well, assuming that I agree with  
7 you with regard to that, and I'm obviously very  
8 troubled as I said to Mr. Nguyen, that okay, they made  
9 a mistake, they gave you too much time, why didn't you  
10 use it? You've still done nothing.

11 I understand his argument as well, but if  
12 it's wrong, it's void as an issue and nothing has  
13 happened. But assume I completely agree with you and  
14 assume also that she has fixed everything up, she's no  
15 longer in violation; should I be granting summary  
16 judgment? Should this so withstand collateral attack  
17 that we literally put on, or metaphorically put on  
18 blinders as to what actually has happened here?

19 MR. COSTA: No, Your Honor. I would not ask  
20 the Court to enter the mandatory injunction for her to  
21 clear a violation that's been cleared. I would only  
22 ask the Court for a prohibitory injunction that if the  
23 violation is, you know -- the violation shall not come

1 back on the property and then, of course, for us to be  
2 able to record that order in the land records.

3 THE COURT: A prohibitory injunction that --

4 MR. COSTA: That the violation of these  
5 particular zoning ordinance sections shall not return  
6 to this particular property; the prohibitory relief  
7 that we've asked for in the complaint. We've asked for  
8 declaratory relief, mandatory relief and prohibitory  
9 relief. It is purely a non-money, non-damages case, if  
10 you will.

11 The declaratory judgement is that the  
12 violations themselves are, in fact -- that these acts  
13 are, in fact, violations of these sections for the  
14 Court to order to the Zoning Administrator, the  
15 mandatory relief that they be cleared within thirty  
16 days of this Court's order, I believe it is in this  
17 case, and then the prohibitory that these violations  
18 shall not come back again in the future on the  
19 property.

20 THE COURT: Okay.

21 MR. COSTA: And all of that is, of course,  
22 the indelible state, the authority for the Zoning  
23 Administrator to ask for that. As I said, Judge

1 Bellows agreed with us in his opinion, as in Chapter  
2 2200 of Title 15.2. And I believe that the organic  
3 statute, if you will, or the statute that creates the  
4 Zoning Administrator and gives her her power to enforce  
5 a zoning ordinance is in Section 15.2-2286(4).

6 THE COURT: And the bottom line is that even  
7 if the Court agrees with you fully, if you go out to  
8 that property armed with your prohibitory injunction  
9 and find that everything's been taken care of, nothing  
10 to be worried about.

11 MR. COSTA: Right, but again, she doesn't  
12 allege that she's cleared it, Mr. Nguyen alleges.

13 THE COURT: No, I understand.

14 MR. COSTA: So even if this Court entered a  
15 mandatory injunction now, frankly, it's no harm, no  
16 foul because we're not going to go out there and say  
17 you have to clear something within thirty days that we  
18 see clearly has been cleared. And I realize that  
19 summary judgment, you know, I understand our posture,  
20 but I would certainly hope she'd want to bring that -

21 THE COURT: Well, when you say the word  
22 "summary judgment," I never feel as though I'm doing a  
23 party a favor by granting summary judgement because the

1 Supreme Court of Virginia has made clear that it's very  
2 hostile or let's put it differently, not enamored of  
3 summary judgments feeling they short-circuit the  
4 litigation process and will do everything possible,  
5 properly of course, to make sure the litigant has its  
6 day in court.

7 MR. COSTA: It's a touchstone of our due  
8 process in this Commonwealth, it's very different from  
9 not only the federal courts, but a lot of other states,  
10 I'm sure and, you know, it's what makes us Virginia.  
11 But of course in this case we have these special cases  
12 of Gwinn v. Alward because of the administrative nature  
13 of the process dictated by the General Assembly.

14 But my point is that if we had a mandatory  
15 injunction that Your Honor entered today as we asked  
16 for and we went out and we truly saw that the violation  
17 had been cleared, my understanding is that she's going  
18 to clear an additional dwelling unit, which is one of  
19 the allegations, she needs to get a demolition permit.  
20 We're the ones who issue the demolition permit. I  
21 don't know that there's -- I mean we have no knowledge  
22 that there's been one, but again, that's not summary  
23 judgment, I appreciate.

1 THE COURT: Right.

2 MR. COSTA: But we are not interested --  
3 there is no reason for this Court to believe or for Ms.  
4 Martinez to believe that if we have a mandatory  
5 injunction entered by this Court today, saw the  
6 violations were cleared, that we're going to go ahead  
7 and try and enforce that injunction --

8 THE COURT: No, I wouldn't think so either.

9 MR. COSTA: -- in some unnecessary way.

10 THE COURT: Well, let me do this; I want to  
11 look at the procedural aspect just a little bit further  
12 and I'll get back to you very shortly.

13 MR. COSTA: Yes, Your Honor, thank you very  
14 much.

15 THE COURT: Thank you, Mr. Costa.

16 MR. COSTA: Have a good weekend.

17 THE COURT: Thank you, sir, thank you. Thank  
18 you, Mr. Nguyen.

19 MR. COSTA: I presume we'll just simply hear  
20 from Ms. Flynn. I'd also like to thank the Court and  
21 Ms. Flynn for moving the date. We originally set it  
22 for December 3rd and Ms. Flynn was very kind, Mr.  
23 Nguyen as well, in allowing me to move it to today

1 because it was my conflict.

2 THE COURT: Ms. Flynn does an absolutely  
3 outstanding job on behalf of the Court, on behalf of  
4 counsel who appear before the Court, and ultimately,  
5 most importantly, on behalf of the parties whose rights  
6 are affected every time they appear in court. We're  
7 always grateful for her good work.

8 Thank you, gentlemen.

9 MR. COSTA: Thank you, Your Honor.

10 MR. NGUYEN: If I may as one counter point  
11 to --

12 THE COURT: Yes, sir.

13 MR. NGUYEN: -- a statement Mr. Costa made?  
14 As far as the ten day permissiveness and thirty day, I  
15 have a letter and this is something that, again,  
16 crossed my desk very recently, a letter dated December  
17 2nd from the County of Fairfax, Virginia for a  
18 violation of the very same violation we're talking  
19 about, 2502. And it's very interesting, in this one  
20 they've given this person, similarly situated, the ten  
21 day notice, Your Honor. And if I could hand that up?

22 THE COURT: I'll be glad to have that.

23 MR. COSTA: I totally object. I have no idea

1 what he's talking about.

2 MR. NGUYEN: I'll show you.

3 (Mr. Nguyen showed a document to Mr. Costa.)

4 It's a letter by his own client that we  
5 have -

6 THE COURT: Well, let Mr. Costa look at it,  
7 but I'm sure if it's on behalf of Fairfax County, I'll  
8 be glad to see it.

9 MR. NGUYEN: Again under the same statute of  
10 judicial notice, Your Honor.

11 THE COURT: Right. But it just seems to me,  
12 if they gave her ten years instead of ten days and she  
13 still hasn't done anything, that really troubles me. I  
14 don't think we can --

15 MR. NGUYEN: And again, on to that statement,  
16 Your Honor --

17 THE COURT: -- reprobate and approbate it at  
18 the same time.

19 MR. NGUYEN: I do have the -- again, this is  
20 something I was going to bring up at trial when the  
21 issues of facts were at issue but since Your Honor has  
22 brought it up, these are the applications that have  
23 been approved for a certain permit that we mentioned in

1 this hearing, demolition --

2 THE COURT: Well, show those to Mr. Costa.

3 MR. NGUYEN: Yeah, these are my originals and  
4 I don't have copies. I didn't think it was going to be  
5 an issue today.

6 THE COURT: I'm sure Mr. Costa will be  
7 thrilled to see those.

8 MR. NGUYEN: But just to respond to that,  
9 I've brought this up with him before that we have  
10 obtained a permit of --

11 THE COURT: All right. Well, I'm going to  
12 consider the matters that are before the Court today  
13 and those matters only.

14 MR. COSTA: All right, Your Honor. And of  
15 course, I would ask that if Your Honor decides to deny  
16 summary judgment that you, of course, not deny it with  
17 prejudice. I think that's normal anyway --

18 THE COURT: Right, uhm-uhm.

19 MR. COSTA: -- grant summary judgment, or  
20 deny it with prejudice, I suppose.

21 My assertions as to these documents are that  
22 Mr. Nguyen, for the Court's benefit, has cited the  
23 wrong statute for public records. He cites the statute

1 that the Court takes judicial notice of laws.

2 There's another statute that says that a  
3 public record shall be admissible as to authenticity  
4 and genuineness. It's also in 801 in the evidence  
5 chapter. I don't have it off the top of my head, that  
6 says only if it's certified by the custodian of record  
7 or by the supervisor of the custodian. That document  
8 is not.

9 I wholly object to the Court considering its  
10 admissibility. I have no idea what that case is about  
11 and, of course, I'm sure that it's factually  
12 distinguishable among other reasons, it probably is --

13 THE COURT: Well, you take a look at it  
14 first. If you stand on your objections, then I won't  
15 receive it until I resolve the objections. But I think  
16 I know what the issues are.

17 MR. COSTA: I appreciate that.

18 THE COURT: I just want to think about it a  
19 little bit.

20 MR. COSTA: Thank you, Your Honor. I really  
21 don't think I need -- I don't want to take up more of  
22 the Court's time. I just want to at least lodge the  
23 objection for the record.

1 THE COURT: I understand.

2 MR. COSTA: And, of course, I just want to  
3 let the Court know this is the first time that I'm  
4 hearing about any additional documentation or anything  
5 like this, even though this motion was set on long  
6 brief and was noted for some time. So I just don't  
7 want you to think that --

8 THE COURT: Well, what I understand Mr.  
9 Nguyen was handing up was simply another case in which  
10 a ten day notice was given instead of a thirty day  
11 notice pursuant to part of the statute. I don't see  
12 how that's here nor there, frankly.

13 MR. NGUYEN: That's why I wasn't prepared to  
14 even bring that up. It just is in my file for future  
15 reference, Your Honor.

16 THE COURT: Okay. All right.

17 MR. COSTA: Thank you, Your Honor.

18 MR. NGUYEN: Thank you, Your Honor.

19 THE COURT: Thank you, thank you all.

20 \* \* \* \* \*

21 (Whereupon, at approximately 11:17 o'clock  
22 a.m., the hearing in the above-entitled matter was  
23 concluded.)

\* \* \* \* \*

## CERTIFICATE OF REPORTER

I, COURTNEY SEBASTIAN, a Verbatim Reporter, do hereby certify that I took the stenographic notes of the foregoing proceeding to the best of my ability which I thereafter reduced to typewriting to the best of my ability, that the foregoing is a true record of said proceedings taken to the best of my ability; that I am neither counsel for, related to, nor employed by any of the parties of the action in which these proceedings were held; and, further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of the action.

/S/ Courtney Sebastian

COURTNEY SEBASTIAN

Verbatim Reporter