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Executive Director

October 4, 2006

Via Facsimile and U.S. Mail

Mayor Robert E. Price, Jr.
Cheryl J. Lahman, Vice Mayor
Anthony Moyer, Council Member
Wayne Porter, Council Member
Kenneth Stubbs, Council Member
Robert Sylvester, Council Member
Morris Willey, Council Member
106 Dorman Street
Harrington, DE 19952

Re: Proposed Ordinance No. 06-10, prohibiting the leasing of property to undocumented immigrants

Dear Mayor Price, Vice Mayor Lahman, and Council Members Moyer, Porter, Stubbs, Sylvester and Willey:

The ACLU Foundation of Delaware writes to urge you, in the strongest of possible terms, to reject proposed Ordinance No. 06-10, entitled "An Ordinance Relating to Illegal Alien Immigration" (the "Ordinance"). With this letter, we wish to provide comment on the proposed city ordinance, due to be heard on second reading before the Council at its October 16th meeting. This ordinance will have a harsh impact on all individuals who might be perceived as "foreign"—regardless of immigration status. It is also vulnerable to legal challenge on constitutional and other grounds, and any such challenge could involve considerable expense to the City.

As you know, proposed Ordinance No. 06-10 would prohibit undocumented immigrants from "leasing or renting property in the City of Harrington." The Ordinance would also provide that "[n]o person shall knowingly allow an illegal alien to use, rent, or lease their property," imposing a fine of \$1,000 on any landlord who violates the Ordinance.

The Ordinance is unlawful for a number of reasons. It impermissibly attempts to regulate immigration and is preempted by federal law and policy; it violates the Due Process guarantees of the Fourteenth Amendment; and it may also violate state and federal civil rights statutes.

First, by attempting to regulate to whom a landlord can rent based on a person's immigration status, the City has reached far beyond its proper authority and police powers provided for under the State's Constitution and statutes. The City of Harrington is without authority to regulate in this area because the Ordinance infringes on the federal government's exclusive and plenary power over all immigration matters

By defining some individuals as "illegal aliens" – without reference to federal law – and then using that definition as a criterion to prohibit individuals from obtaining housing, the Council is effectively trying to regulate immigration, and is doing so in a manner that conflicts with federal law. Although the City may disagree with federal policies, or the manner in which the federal government is performing its job with respect to immigration, neither the City of Harrington, nor the thousands of other cities and municipalities across this country, may assume a task that is constitutionally reserved to the federal government.

Second, the proposed Ordinance violates the procedural due process rights of landlords and tenants. The Fourteenth Amendment guarantees that "no person shall be deprived of life, liberty, or property without due process of law." The Ordinance does not provide any procedure for determining whether an individual is an "illegal alien," or any process by which an individual can challenge a determination that he or she is an "illegal alien" as defined by the Ordinance. Thus, the Ordinance fails to provide landlords and tenants with procedural due process protections before depriving them of fundamental rights, including the right to contract, to engage in a business, to earn a livelihood, and to continue one's residence.

Third, by making property owners, renters, and landlords subject to sizeable fines for renting, leasing, or allowing the use of their property to undocumented immigrants, without providing any guidance or notice as to what is required, the Ordinance creates an unduly broad and undifferentiated risk of liability. It assumes that property owners, renters, and landlords can be and will be familiar with myriad immigration laws. It suggests no process for a property owner, renter, or landlord to follow to verify that an immigrant is documented. Faced with this situation, property owners, renters, and landlords may decide to avoid renting or leasing to individuals who appear or sound foreign or are identifiable with major immigrant groups in an attempt to comply with the Ordinance. This may open property owners, renters and landlords *and* the City of Harrington to complaints of unlawful discrimination on the basis of national origin.

Finally, many policy reasons also dictate against the passage of this ill conceived and unnecessary Ordinance. The Ordinance threatens great human and social costs, not only by dispossessing undocumented immigrants, but by denying their children the opportunity to receive an education. Under this Ordinance, undocumented parents would be unable to establish residence within city limits and consequently would be unable to enroll their children, whether citizens or undocumented, in city schools. In striking down a state attempt to deny undocumented children access to an education, the Supreme Court emphasized the unfairness of punishing children for something over which they have no control, and the harm of denying a group the means to absorb the values and skills on which our society depends, particularly when many of them will eventually become lawful residents or citizens of the United States.¹

In addition, neither the City of Harrington, nor its officials, employees, agents or residents, are authorized to conduct the proceedings required under the Constitution and federal law to determine whether an individual has lawfully entered or remained in the United States. Harrington officials, employees, agents and residents also lack the authority to make discretionary decisions regarding an individual's ability to stay in the United States. Designated, trained federal officials are the only persons authorized to undertake such proceedings and make such determinations. It is unlikely that the Harrington officials responsible for implementing the Ordinance have the expertise and training necessary to apply immigration law, make immigration status determinations, or determining the authenticity of immigration-related documentation. For many persons, no document or combination of documents can conclusively establish whether they are "illegal aliens" as defined by the Ordinance.

As you presumably know already, the nonpartisan Congressional Research Service has issued the attached report, in which it sets forth its analysis of the legality of the ordinance initially approved by the town of Hazleton, Pennsylvania. That report concluded that the Hazleton ordinance was likely to be found unlawful.

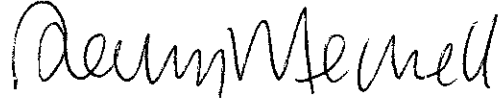
In hopes of resolving this matter amicably, the ACLU Foundation of Delaware urges you to revoke this Ordinance at the Council's next meeting on October 16th. In the event that the Ordinance becomes law, the ACLU will consider challenging it in court. If such a challenge is upheld,

¹ *Plyer v. Doe*, 457 U.S. 202 (1982) (undocumented children may not be denied a public elementary and secondary education).

the City will be subject to injunctive relief, possible monetary damages, and the payment of attorneys' fees and costs, which will likely be quite substantial. We hope that such a challenge will not be necessary.

We thank you in advance for consideration of this matter and look forward to your prompt reply.

Sincerely,

A handwritten signature in black ink that reads "Drewry Nash Fennell". The signature is written in a cursive, flowing style.

Drewry Nash Fennell
Executive Director
ACLU of Delaware

Enclosure