

VIRGINIA:

FILED  
COURT SERVICES

IN THE CIRCUIT COURT FOR THE COUNTY OF FAIRFAX

KRISH KARUNAKARAM, M. McDOWELL,  
SUSAN M. POWELL, WILLIAM B. SMITH,  
CHERYL I. SMITH, GEORGE A. TAPLIN  
and All Others Similarly Situated

2005 OCT 19 AM 11:51  
JOHN T. FREY  
CLERK, CIRCUIT COURT  
FAIRFAX, VA

Plaintiffs,

v.

Chancery No. CH 2005 4013

TOWN OF HERNDON,

Defendant.

**UNOPPOSED MOTION FOR LEAVE TO FILE  
AMENDED BILL OF COMPLAINT**

COME NOW plaintiffs seeking leave to amend their Bill of Complaint in the above-captioned matter. Since the filing of the Bill of Complaint in this matter, certain events have occurred that make it appropriate to amend the Bill of Complaint, most significantly adding Fairfax County as a co-defendant. Plaintiffs therefore seek leave to file the accompanying Amended Bill of Complaint.

Defendant Town of Herndon has consented to this Motion. A proposed Agreed Order also is attached.

October 18, 2005

Respectfully submitted,



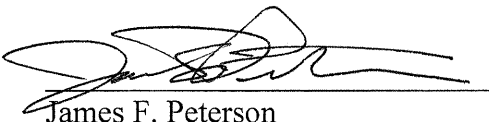
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Attorneys for Plaintiffs

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing Unopposed Motion to File An Amended Bill of Complaint was sent by facsimile and first class mail, postage prepaid, on October 18, 2005, to the following persons:

Waller T. Dudley  
William G. Broaddus  
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Counsel for Town of Herndon

  
James F. Peterson

**VIRGINIA:**

**IN THE CIRCUIT COURT FOR THE COUNTY OF FAIRFAX**

KRISH KARUNAKARAM  
1514 Summerset Place  
Herndon, Virginia 20170-3936

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DENNIS D. CARTER  
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ALAN J. TRUELOVE  
3444 Surrey Lane  
Falls Church, Virginia 22042

And

All Others Similarly Situated

Plaintiffs,

v.

Chancery No. CH 2005 4013

TOWN OF HERNDON

COUNTY OF FAIRFAX, VIRGINIA

Defendants.

**AMENDED BILL OF COMPLAINT  
FOR DECLARATORY AND INJUNCTIVE RELIEF**

## **NATURE OF ACTION**

1. Plaintiffs, taxpayers and residents of the Town of Herndon and the County of Fairfax (“Fairfax County” or “the County”), bring this action to enjoin the use of taxpayer funds and taxpayer-financed resources to establish a “Day Laborer Site” in the Town of Herndon and for a judgment declaring establishment of the site to be unlawful.

## **PARTIES**

2. Plaintiff Krish Karunakaram is a resident and taxpayer of the Town of Herndon and Fairfax County. Mr. Karunakaram has paid taxes to the Town of Herndon and Fairfax County and has been and will continue to be injured by the expenditure of taxpayer funds and/or taxpayer-financed resources in furtherance of the Day Laborer Site.

3. Plaintiff Susan M. Powell is a resident and taxpayer of the Town of Herndon and Fairfax County. Ms. Powell has paid taxes to the Town of Herndon and Fairfax County and has been and will continue to be injured by the expenditure of taxpayer funds and/or taxpayer-financed resources in furtherance of the Day Laborer Site.

4. Plaintiff Elizabeth H. Robson is a resident and taxpayer of the Town of Herndon and Fairfax County. Ms. Robson has paid taxes to the Town of Herndon and Fairfax County and has been and will continue to be injured by the expenditure of taxpayer funds and/or taxpayer-financed resources in furtherance of the Day Laborer Site.

5. Plaintiff George A. Taplin is a resident and taxpayer of the Town of Herndon and Fairfax County. Mr. Taplin has paid taxes to the Town of Herndon and Fairfax County and has been and will continue to be injured by the expenditure of taxpayer funds and/or taxpayer-financed resources in furtherance of the Day Laborer Site.

6. Plaintiff Kathleen A. Kaake is a resident and taxpayer of the Town of Herndon and Fairfax County. Ms. Kaake has paid taxes to the Town of Herndon and Fairfax County and has been and will continue to be injured by the expenditure of taxpayer funds and/or taxpayer-financed resources in furtherance of the Day Laborer Site.

7. Plaintiff Dennis D. Carter is a resident and taxpayer of Fairfax County. Mr. Carter has paid taxes to Fairfax County and has been and will continue to be injured by the County's expenditure of taxpayer funds and/or taxpayer-financed resources in furtherance of the Day Laborer Site.

8. Plaintiff Alan J. Truelove is a resident and taxpayer of Fairfax County. Dr. Truelove has paid taxes to Fairfax County and has been and will continue to be injured by the County's expenditure of taxpayer funds and/or taxpayer-financed resources in furtherance of the Day Laborer Site.

9. Defendant Town of Herndon is a municipal corporation situated within Fairfax County, Virginia.

10. Defendant Fairfax County is a political subdivision within the Commonwealth of Virginia.

### **JURISDICTION AND VENUE**

11. This action is a civil case in chancery seeking a declaratory judgment and an injunction against Defendants' unlawful acts. This Court has jurisdiction over this action pursuant to Virginia Code §§ 8.01-184, 8.01-620, and 17.1-513.

12. Venue is preferred in this county as provided by Virginia Code § 8.01-261(15)(c), because Plaintiff seeks the award of an injunction against acts being done in this County. Venue

is permissible in this county as the Defendants are located within this county and the cause of action arose within this county. Va. Code §§ 8.01-262(1) and (4).

### **STATEMENT OF FACTS**

13. Plaintiffs bring this action on behalf of themselves and all other similarly situated taxpayers residing in the Town of Herndon and Fairfax County. As the Supreme Court of Virginia has stated,

[A] citizen or taxpayer may challenge the legality of certain actions of a local government and its expenditures, because the interest of a citizen in matters of local government is direct and immediate, rather than remote and minute. . . . The direct and immediate interest of the citizen in the operation of local government, whether based on issues arising from a local election or a local government's exercise of its fiscal authority, permits these citizen or taxpayer challenges.

*Goldman v. Landslide*, 262 Va. 364, 375, 552 S.E.2d 67, 72 (2001) (citations omitted).

14. On August 17, 2005, the Town of Herndon, by and through its elected Town Council, approved an application for a conditional use permit sought by an organization known as Project Hope & Harmony (“PH&H”) of Reston, Virginia. *See* Resolution, Application For A Conditional Use Permit, C.U. #05-11 (“Permit”) (attached as Exhibit 1). On information and belief, PH&H was created by Reston Interfaith, a nonprofit organization founded, supported, and directed by area religious organizations.

15. In approving the Permit, the Town of Herndon authorized the creation and operation of a “Temporary Regulated Day Worker Assembly and Hiring Site” (“Day Laborer Site”) on Town property. The Day Laborer Site will be located on public property at 1481 Sterling Road, Herndon, Virginia, identified on Fairfax County Tax Map 010-3-002, Parcel 7D.

16. The Day Laborer Site authorized by the Town of Herndon involves the use of

taxpayer-financed resources having a substantial dollar value, including, but not limited to, the rent-free use of public land. The Day Laborer Site will be operated by PH&H without the payment of any rent or fees to the Town of Herndon. *See* Permit at 1.

17. The Day Laborer Site has been authorized to be on Town of Herndon property for a period of two years, effective as of September 15, 2005, with up to three one-year extensions, if granted by the Town Council. *See* Permit at 4, ¶ (s); Zoning Ordinance § 78-107.

18. The stated purpose of the Day Laborer Site is to provide an “assembly site where day laborers can congregate *for the purpose of finding work.*” *See* Town of Herndon, Virginia, Planning Commission Staff Report, Update Summary, dated August 11, 2005 (“Staff Report”), at 3 (emphasis added).

19. At the present time, day laborers congregate at certain locations in Herndon and elsewhere in Fairfax County for the purpose of finding work. Day laborers work most often in construction, landscaping, painting, and janitorial services. Prospective employers drive to such locations, pick up laborers, and transport them to a work site.

20. After two lengthy hearings on August 1 and August 3, 2005, the Town of Herndon’s Planning Commission recommended against authorization of the Day Laborer Site by the Town Council. *See* Permit at 1.

21. The Day Laborer Site will provide a variety of employment services to persons who use the Day Laborer Site, including matching employers with laborers according to the laborers’ respective skill sets, and establishing and enforcing a code of conduct for laborers and employers. *See* Permit at 2 ¶ (e); Staff Report at Attachment 3, page 10 and Attachment 5, para.

12. The Day Laborer Site also will provide a variety of other employment services, including

“job training, language and literacy classes, job development, workers rights and immigration law assistance, and leadership development.” *See* Permit at 7 ¶ (ae); Staff Report at Attachment 3, page 12 and Attachment 5, para. 12.

22. Upon information and belief, persons seeking employment at the Day Laborer Site predominantly will include undocumented workers and the Town Council knew this to be the case when it approved the Day Laborer Site.

23. The application for the Day Laborer Site and the “Operating Policy and Procedures” indicates that the Day Laborer 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 (*see* Staff Report at Attachments 3 and 5).

24. At the time the Town Council considered whether to approve the Day Laborer Site, it was aware of a Fairfax County survey, taken in the Fall of 2003 and published in June 2004, relating to day laborers. *See* Dep’t of Systems Management for Human Services, “An Account of Day Laborers in Fairfax County,” June 2004 (“Fairfax County Survey”). The survey interviewed two hundred and one (201) day laborers at four (4) “informal” day laborer sites in Fairfax County, including a site in Herndon. *Id.* at 5. The results of the survey showed that the overwhelming majority of day laborers interviewed -- some eighty-five percent (85%) -- preferred permanent employment to day labor. *Id.* at 15. Of this eighty-five percent (85%), approximately eighty-five percent (85%) cited the lack of documentation as being a barrier to obtaining permanent employment. *Id.* These results demonstrate that a substantial majority of persons likely to use the Day Laborer Site lack the documentation to work legally in the United States because they would otherwise seek permanent employment. Significant use was made of



the Fairfax County Survey by PH&H and the Town's Planning Commission and the Town Council during the application process.

25. When it approved creation of the Day Laborer Site, the Town Council was aware of the Fairfax County Survey and, therefore, reasonably knew that the Day Laborer Site would be used to assist persons not legally present or authorized to work in the United States.

26. Members of the Town Council who opposed authorization of the Day Laborer Site openly stated at the Town Council meeting, held on August 17, 2005, that spending money on a day laborer site would amount to an endorsement of illegal immigration. *See The Washington Post*, "Herndon Approves Day Labor Center: Immigration Called 'Out of Our Control,'" August 18, 2005, at A1.

27. As required by the Town of Herndon, PH&H must distribute information at the Day Laborer Site to prospective employers informing them that hiring illegal aliens is unlawful. *See The Washington Post*, "Herndon Approves Day Labor Center: Immigration Called 'Out of Our Control,'" August 18, 2005, at A1.

28. Nonetheless, the Town of Herndon's authorization of the Day Laborer Site is not contingent upon any requirement that persons seeking employment at the Day Laborer Site will be screened to determine whether, in fact, they are eligible to work in the United States. PH&H has stated publicly that it will not screen persons seeking employment at the Day Laborer Site to determine whether, in fact, they are eligible to work in the United States. *See The Washington Post*, "Herndon Approves Day Labor Center: Immigration Called 'Out of Our Control,'" August 18, 2005, at A1.

29. At a meeting held September 12, 2005, the Fairfax County Board of Supervisors (“Board of Supervisors”) voted to provide a total of \$400,000 in funding for day laborer sites within Fairfax County, including the Day Laborer Site in Herndon.

30. According to the Mayor of the Town of Herndon, Michael L. O’Reilly, the County will provide approximately \$170,000 in funding to PH&H to operate the Day Laborer Site.

31. Upon information and belief, persons seeking employment at the Day Laborer Site predominantly will include undocumented workers and the Board of Supervisors knew this to be the case when it approved funding for the Day Laborer Site and other sites with the County.

32. When it approved funding for the Day Laborer Site, the Board of Supervisors was aware of the Fairfax County Survey and, therefore, reasonably knew that the Day Laborer Site would be used to assist persons not legally present or authorized to work in the United States.

33. Fairfax County’s expenditure in support of the Day Laborer Site is not contingent upon any requirement that PH&H screen persons seeking employment at the Day Laborer Site to determine whether, in fact, they are eligible to work in the United States.

34. Virginia law states that any action taken by a municipality or a county must be consistent with federal and state law:

The Constitution and the law 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 (effective October 1, 2005; previously codified in substantially similar form at Va. Code § 1-13.17).

35. Federal law prohibits employers from hiring undocumented workers. It is unlawful to recruit or hire an alien if it is known that the alien is not authorized to work in the United States. 8 U.S.C. § 1324a(a)(1)(A). It also is unlawful to hire any individual for employment in the United States without complying with federal employment eligibility verification requirements. 8 U.S.C. § 1324a(a)(1)(B)(i). Federal law also makes it illegal to “encourage or induce an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law.” 8 U.S.C. § 1324(a)(1)(A)(iv). Aiding or abetting the commission of such acts also is a violation of federal law. 8 U.S.C. § 1324(a)(1)(A)(v)(II).

36. Federal law also prohibits conspiracies to violate the law of the United States:

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 of such persons 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.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. § 371.

37. It is also unlawful to aid or abet a violation of federal law or cause an act to be done by a third party, which, if done directly, would be unlawful:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 2.

38. The use of taxpayer funds and taxpayer-financed resources in furtherance of the Day Laborer Site also is in violation of the federal law prohibiting “any State or local public benefit” to illegal aliens. 8 U.S.C. § 1621.

39. In addition, the Virginia General Assembly has adopted a statute prohibiting public assistance to illegal aliens. *See* Va. Code § 63.2-503.1. Effective January 1, 2006, the statute provides, in pertinent part, that “no person who is not a United States Citizen or legally present in the United States shall receive state or local public assistance pursuant to this subtitle, except for state or local public assistance that is mandated by Federal Law pursuant to 8 U.S.C. § 1621.” *Id.* at § 63.2-503.1(A). In addition, the statute requires, in pertinent part, that any person seeking public assistance “provide affirmative proof that he is a U.S. citizen or is legally present in the United States.” *Id.* at § 63.2-503.1(B). “Public assistance,” as defined by Va. Code § 63.2-100, includes “employment services.”

40. Under Virginia law, a local government has only those powers that are expressly granted by the state legislature, those powers fairly or necessarily implied from expressly granted powers, and those powers which are essential and indispensable. *Arlington County v. White*, 259 Va. 708, 712, 528 S.E.2d 706, 708 (2000). Furthermore, if the state legislature grants a local government the power to do something but does not specifically direct the method of implementing that power, the method selected by the local government must be reasonable. *Id.*

41. The Town of Herndon’s zoning ordinance § 78-107(11) requires that “[a]ll activities conducted on the site shall be carried out in a lawful manner, as determined by competent town, Virginia, or federal authorities.”

42. When a municipality's decision to issue a conditional use permit is challenged, a court reviews the decision to determine whether the issuance of the permit was arbitrary, capricious, and unreasonable. The party challenging the decision must establish that the decision was unreasonable:

If the presumptive reasonableness of zoning action is challenged by probative evidence of unreasonableness, the challenge must be met with evidence of reasonableness. If such evidence of reasonableness is sufficient to make the issue fairly debatable, the legislative action must be sustained; if not, the presumption is defeated by the evidence of unreasonableness and the legislative act cannot be sustained.

*Concerned Taxpayers of Brunswick County v. County of Brunswick*, 249 Va. 320, 327, 455 S.E.2d 712, 716 (1995).

## **COUNT I**

### **FIRST CAUSE OF ACTION FOR DECLARATION REGARDING ILLEGAL USE OF TAXPAYER FUNDS**

43. Plaintiffs incorporate paragraphs 1 to 42, and each of them as if they were set forth in full.

44. Defendants' expenditure of taxpayer funds and taxpayer-financed resources in furtherance of the Day Laborer Site, for the express purpose of facilitating employment of persons not legally present in the United States, contravenes federal law, including, but not limited to: 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; and 8 U.S.C. § 1621.

45. Plaintiffs seek a judicial determination and declaration that Defendants' expenditure of taxpayer funds and taxpayer-financed resources in furtherance of the Day Laborer Site is unlawful and void.

## **COUNT II**

### **SECOND CAUSE OF ACTION FOR DECLARATION REGARDING VIOLATION OF VIRGINIA CODE § 63.2-503.1**

46. Plaintiffs incorporate paragraphs 1 to 45, and each of them as if they were set forth in full.

47. The services to be provided at the Day Laborer Site constitute public assistance as “employment services,” as defined by Va. Code § 63.2-100. These services are intended to and will benefit persons not legally present in the United States. Defendants’ expenditure of taxpayer funds and use of taxpayer-financed resources in furtherance of the Day Laborer Site, therefore, is in violation of Va. Code § 63.2-503.1(A). In addition, because Defendants require no proof of citizenship or legal status by persons using the Day Laborer Site, the use of taxpayer-financed funds and taxpayer-financed resources to create and operate the Day Laborer Site also is in violation of Va. Code § 63.2-503.1(B).

48. Plaintiffs seek a judicial determination and declaration that Defendants’ expenditure of taxpayer funds and taxpayer-financed resources in furtherance of the Day Laborer Site is in violation of Virginia law, including, but not limited to, Va. Code § 63.2-503.1 and is unlawful and void.

## **COUNT III**

### **THIRD CAUSE OF ACTION FOR DECLARATION REGARDING ULTRA VIRES ACT**

49. Plaintiffs incorporate paragraphs 1 to 48, and each of them as if they were set forth in full.

50. No Virginia statute expressly authorizes a municipality or county such as Defendants to establish a Day Laborer Site. The use of taxpayer funds and taxpayer-financed resources in furtherance of the Day Laborer Site are therefore *ultra vires* acts.

51. Even if the authority to establish the Day Laborer Site arguably could be implied from powers granted to the Town of Herndon or Fairfax County by Virginia law, the creation and support of the Day Laborer Site are not reasonable methods of implementing those powers.

52. As a result, a declaratory judgment should issue that the use of taxpayer funds and taxpayer-financed resources in furtherance of the Day Laborer Site are *ultra vires* acts and unlawful and void.

#### **COUNT IV**

#### **FOURTH CAUSE OF ACTION FOR DECLARATION REGARDING ARBITRARY, CAPRICIOUS, AND UNREASONABLE NATURE OF ACT (AS TO DEFENDANT TOWN OF HERNDON ONLY)**

53. Plaintiffs incorporate paragraphs 1 to 52, and each of them as if they were set forth in full.

54. The Town of Herndon has, contrary to federal and Virginia law, including, but not limited to 8 U.S.C. § 1324(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, and Virginia Code § 63.2-503.1, and without lawful authority, authorized the use of taxpayer-financed funds and taxpayer-financed resources to create and operate the Day Laborer Site.

55. The Town of Herndon also has violated zoning ordinance § 78-107(11) requiring that “[a]ll activities conducted on the site shall be carried out in a lawful manner, as determined

by competent town, Virginia, or federal authorities.” Despite this requirement, the Town of Herndon made no provision to prevent the violations of federal law and Virginia law that will take place on the Day Laborer Site or that will be facilitated by the existence of the site.

56. As it is contrary to federal law, Virginia Code § 63.2-503.1, and an *ultra vires* act, and as it is contrary to its own zoning ordinances, approval of the Day Laborer Site by the Town of Herndon constitutes an arbitrary, capricious, and unreasonable act.

57. As a result, a declaratory judgment should issue that the use of taxpayer-financed funds and taxpayer-financed resources to create and operate the Day Laborer Site constitutes an arbitrary, capricious, and unreasonable act.

#### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs pray as follows:

1. A declaration that the expenditure of taxpayer funds and taxpayer-financed resources in furtherance of the Day Laborer Site is unlawful and void as violation of federal law, Va. Code § 63.2-503.1, an *ultra vires* act and, as to the Town of Herndon only, an arbitrary and capricious, and unreasonable act;
2. The Court issue permanent injunctive relief prohibiting Defendants from expending taxpayer funds and taxpayer-financed resources in furtherance of the Day Laborer Site;
3. Awarding Plaintiffs and their attorneys their costs and attorneys’ fees;
4. Such other relief as to equity may seem just and the nature of the case may require.

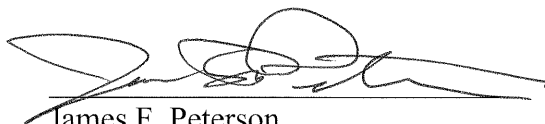


PLAINTIFFS DEMAND A TRIAL BY JURY ON ALL CLAIMS SO TRIABLE.

Respectfully submitted,

DATED: October 18, 2005

By:

A handwritten signature in black ink, appearing to read "James F. Peterson", written over a horizontal line.

James F. Peterson

Va. Bar No. 36211

Paul J. Orfanedes

(Not a Member of the Virginia Bar)

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Attorneys for Plaintiffs

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF FAIRFAX

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SUSAN M. POWELL, WILLIAM B. SMITH,  
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And

All Others Similarly Situated

Plaintiffs,

v.

Chancery No. CH 2005 4013

TOWN OF HERNDON

Defendants.

**AGREED ORDER**

IT APPEARING to the Court that:

1. Plaintiffs seek to file an Amended Bill of Complaint in this matter;
2. Defendant Town of Herndon has consented to the filing of the Amended Bill of Complaint sent to counsel on October 13, 2005, without waiver of any rights or defenses. Therefore it is

ADJUDGED, ORDERED, and DECREED that plaintiffs' Motion for Leave to File the Amended Bill of Complaint is GRANTED, and it is deemed filed as of this date.

ENTERED this \_\_\_\_\_ day of October, 2005

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JUDGE

**WE ASK FOR THIS:**

Counsel for Plaintiffs

By: 

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**SEEN & AGREED:**

Counsel for Town of Herndon

By: 

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DATED: October 17, 2005

DATED: October 12, 2005