STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

INVESTIGATIVE REPORT By MARK BRNOVICH ATTORNEY GENERAL September 9, 2016	No. 16-001 Re: Snowflake Town Council's approval of a Special Use Permit and Medical Marijuana Cultivation Facilities Agreement for Copperstate Farms, LLC

To: The Honorable Douglas A. Ducey, Governor of Arizona
The Honorable Andy Biggs, President of the Arizona State Senate
The Honorable David M. Gowan Sr., Speaker of the Arizona House of Representatives
The Honorable Paul Boyer, Member of the Arizona Legislature
The Honorable Michele Reagan, Secretary of State of Arizona

Pursuant to Arizona Revised Statutes ("A.R.S.") § 41-194.01, the Attorney General's Office ("Office") has investigated the Snowflake Town Council ("Town Council")'s approval, on or about June 28, 2016 and August 12, 2016, of a Special Use Permit ("SUP") and Medical Marijuana Cultivation Facilities Agreement ("Facilities Agreement") for Copperstate Farms, LLC ("Copperstate"). Based on information voluntarily provided by the Town of Snowflake ("Town") and a review of relevant authorities during the circumscribed 30-day period of § 41-194.01(A), the Attorney General has determined that the Town Council's official actions **may violate** one or more provisions of state law or the Arizona constitution. This report provides the findings and conclusions from the Office's investigation.

Questions Presented

1. Did the Snowflake Mayor and Councilmembers violate the open meetings law, A.R.S. § 38-431 *et seq.*, by allegedly communicating with Copperstate regarding the SUP and Facilities Agreement outside of duly noticed public meetings?

2. Did the Town Council fail to comply with the notice requirements in A.R.S. § 9-462.04 for setting a hearing on a zoning ordinance when the Town Council did not provide fifteen days advance notice of its June 28, 2016 vote to approve the SUP?

3. Did the Town Council engage in "contract zoning" when it approved the Facilities Agreement, which requires Copperstate to pay the Town up to $800,000 per year pursuant to a "[Business] License Fee payment schedule"?

4. Did the Town Council place an undue burden on the right to referendum, Ariz. Const. art. IV, pt. 1, § 1(8), by refusing to approve the minutes for its June 28, 2016 meeting?

5. Did the Town deny access to public records in violation of A.R.S. § 39-121 *et seq.*?

Summary Answer

The issues identified in Questions 1, 2, 4, and 5 are beyond the scope of A.R.S. § 41-194.01 because they require reviewing factual questions relating to compliance with purely procedural obligations that are not incorporated in an ultimate, substantive "ordinance, regulation, order or other official action" produced by the Town's governing body.

With respect to question 3, the Town Council's approval of the Facilities Agreement does not implicate "contract zoning." That theory is not recognized by Arizona courts, and even if it were, there is no evidence that the Facilities Agreement delegates zoning power or impermissibly binds future Town Councils. The Facilities Agreement may nevertheless violate state law. The "[Business] License Fee payment schedule" in the Facilities Agreement appears to establish a tax

unique to Copperstate that was determined on an *ad hoc* basis, which may violate the Equal Privileges and Immunities Clause, Ariz. Const. art. II, § 13. Alternatively, even if the license fee is a monetary exaction for a land use rather than a tax or fee, it is problematic under *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013), because it likely does not possess an essential nexus and rough proportionality to the impact of the land use.

Background

Voters approved Proposition 203 in 2010, adding a medical marijuana-related chapter to A.R.S. Title 36. *See* A.R.S. §§ 36-2801 to -2819. On or about April 19, 2016, Copperstate signed paperwork to purchase land in the Town, with the intent of operating a medical marijuana cultivation facility. Such an operation would require an SUP under § 4-5-3(D) of the Town Code.[1]

Before submitting its SUP application, Copperstate representatives met with Town officials several times to discuss Copperstate's proposed land use and its forthcoming SUP application. On May 19, 2016, Copperstate submitted an SUP application to the Town that sought approval for use of 43.27 acres as a medical marijuana cultivation facility.

The Town and Copperstate also negotiated a Facilities Agreement, which provides, among other things, that the Town would supply "enhanced police, fire, and paramedic protection," including an electronic alarm and video surveillance system directly connected to the Town's police and fire stations. The agreement also provided for the Town to assist Copperstate with its regulatory compliance and obtaining utilities. Copperstate agreed, among

[1] This report does not address the lawfulness Copperstate's actions (under A.R.S. §§ 36-2801 to -2819 or other laws). It solely addresses the lawfulness of the Town Council's official actions of approving the SUP and Facilities Agreement.

other things, to pay a quarterly "Town of Snowflake Business License Fee," pursuant to a fee schedule set out in the Facilities Agreement.

The Town Planning and Zoning Commission ("Zoning Commission"), at a Public Hearing on June 21, 2016, voted against recommending approval of the Copperstate SUP application. At a June 28, 2016 Council meeting, the Town Council voted 4-3 to approve Copperstate's SUP and enter into the Facilities Agreement. That same day, Copperstate and the Town, through Mayor Tom Poscharsky, executed the Facilities Agreement.

The Zoning Commission and the Town Council each later held a second meeting concerning the Copperstate SUP application. At a meeting held August 11, 2016, the Zoning Commission's vote split 2-2, which had the effect of denying the Copperstate SUP application. The next day, Mayor Poscharsky filed an appeal of the Zoning Commission's vote, thereby placing the SUP before the Town Council. At a meeting held that same day, August 12, 2016, the Town Council voted 4-3 to approve the Copperstate SUP.

On August 11, 2016, Representative Paul Boyer submitted a request for investigation ("Request") pursuant to A.R.S. § 41-194.01. The Town fully cooperated with the Office's investigation. It promptly provided a voluntary response through counsel to the Request, responded to two public records requests from the Office, and responded to additional factual and legal questions from the Office. In performing this investigation during the circumscribed 30-day period, the Office reviewed relevant materials and authorities. The Office's legal conclusions are set forth below; the facts recited in this report serve as a basis for those legal conclusions, but are not administrative findings of fact and are not made for purposes other than those set forth in § 41-194.01.

Analysis

I. The Issues Raised By The Request in Questions 1, 2, 4, and 5 Are Beyond the Scope of § 41-194.01.

The Request includes several questions that raise issues beyond the scope of the Office's limited authority under A.R.S. § 41.194.01. These include the allegations that: there are possible violation of Arizona's open meetings law, A.R.S. § 38-431 *et seq.* (Question 1); the Town Council violated A.R.S. § 9-462.04 by providing insufficient notice for the June 28, 2016 Town Council meeting that approved the SUP (Question 2); the Town violated state law by refusing to approve Town Council meeting minutes for the June 28, 2016 meeting, as required by A.R.S. § 38-431.01 (Question 4); and the Town violated the public records law, A.R.S. § 39-121 *et seq.* (Question 5).

Section 41-194.01 contemplates investigation of only legal issues incorporated into and evident from final, substantive actions adopted or taken by the Town's governing body.[2] Because Questions 1, 2, 4, and 5 involve review of factual, rather than legal, questions and relate to compliance with purely procedural obligations not incorporated in an ultimate, substantive "ordinance, regulation, order or other official action" taken by a governing body, they are not proper subjects for the Office to make findings and conclusions upon in connection with A.R.S. § 41.194.01.[3]

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[2] This understanding of A.R.S. § 41-194.01 is bolstered by the fact that § 41-194.01 provides a limited, 30-day investigative period and gives the Office no independent subpoena or other compulsory powers to fully investigate factual questions during that period.

[3] Nonetheless, the Office is conducting a separate investigation under the open meetings law, which contains specific statutory remedies. *See, e.g.*, A.R.S. § 38-431.07. Additionally, the public records law contains its own enforcement mechanism, which may be pursued independently.

II. The Town Council's Approval of the Facilities Agreement, Including the "[Business] License Fee Payment Schedule," May Violate Arizona Law.

The Town Council's approval of the Facilities Agreement may violate state law or the Arizona Constitution based on the up to $800,000 per year "license fee" to be paid by Copperstate to the Town per the agreement. As a preliminary matter, the Request identified the issue of "contract zoning," but the Facilities Agreement does not appear to implicate that theory, which is not recognized by Arizona Courts.[4] However, in presenting its "contract zoning" theory, the Request more generally alleges:

> The effect of the SUP and Facilities Agreement is that Copperstate and the Town of Snowflake have entered into a *quid pro quo* arrangement, whereby Copperstate agrees to make monthly cash payments to the Town of Snowflake in consideration for the approval of the SUP. This contractual arrangement between the Town of Snowflake and Copperstate is impermissible.

Viewed in light of this broader challenge, the Town's actions in approving the Facilities Agreement with the up to $800,000 per year "license fee" may violate Arizona law. *See also* A.R.S. § 41-194.01(B)(1) (requiring the Office to review actions of a governing body to determine whether the action "[v]iolates *any provision* of state law or the Constitution of Arizona" (emphasis added)). The threshold issue is whether the license fee is a tax (or fee), or instead a monetary exaction for the conditional use of land. If it is a tax or fee, then it may violate the Arizona Constitution's Equal Privileges and Immunities Clause. Even if the license

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[4] Even if Arizona were to recognize a "contract zoning" cause of action, it does not appear that such a claim would exist here. The Town has not delegated its zoning power to Copperstate. The SUP and Facilities Agreement specifically provide for a particular use of the land at issue and do not present Copperstate with any discretion to exercise the zoning power. Moreover, there is no improper contractual binding of future Town Councils because the Town may enter into agreements "relating to property in the municipality." *See* A.R.S. § 9-500.05; *Pure Wafer, Inc. v. City of Prescott*, 14 F. Supp. 3d 1279, 1296 (D. Ariz. 2014) (upholding a development agreement between a city and private party in part because "nothing in the Agreement suggests they contracted to bind the City's future exercise" of relevant powers).

fee is a monetary exaction, it nonetheless may violate the Takings Clause of the Arizona Constitution.

A. The License Fee Appears to be a Tax (or Fee), Rather than a Monetary Exaction for the Conditional Use of Land.

The legal requirements applicable to the license fee depend on whether the Town's imposition of that payment is analyzed as a tax (or fee) or instead as a monetary exaction for the conditional use of land. In *Koontz v. St. Johns River Water Management District*, the United States Supreme Court recognized that a mandatory payment imposed in return for permitting a land use can involve two distinct powers—"the power to tax and the power to take by eminent domain." 133 S. Ct. at 2600. Moreover, the fact that a mandatory payment may be improper under one power does not mean it is improper under the other. *See id.* at 2600-01. The Court did not provide specific criteria for determining "the difference between taxes and takings," but rather recognized that it is generally not difficult in practice to do so. *Id.* at 2601.

Here, based on the language and structure of the Facilities Agreement, the License Fee is most likely an exercise of the power to impose taxes and fees, rather than a monetary exaction tied to the conditional use of land. The Town's "authority is limited to those powers expressly, or by necessary implication, delegated to [it] by the state constitution or statutes." *Home Builders Ass'n of Cent. Ariz. v. City of Maricopa*, 215 Ariz. 146, 149 ¶ 5 (App. 2007). As relevant to the imposition of the license fee, the Town has the power "[t]o fix the amount of license taxes to be paid by any person, firm, corporation or association for carrying on any business, game or amusement, calling, profession or occupation." A.R.S. § 9-240(B)(18). The license fee imposed appears consistent with an exercise of that taxing power.[5] The Facilities

[5] Moreover, it appears that the Town does not have power to set a license "fee" of the magnitude or duration at issue here. *See* A.R.S. § 9-240(B)(19) (specifically limiting fees for licenses to a

Agreement provides the following schedule for the license fee:

0 to 10 net acres:	$10,000 per net acre per year
11 to 30 net acres:	$20,000 per net acre per year over 10 net acres
31 to 39 net acres:	$30,000 per net acre per year over 30 net acres
40 net acres or more:	$800,000 or an average price of $20,000 per net acre per year, whichever is more.

Facilities Agreement at § 5(B). It also expressly provides that the license fee is reduced dollar-for-dollar if the Town raises sales taxes, use taxes, or other taxes or fees (beyond those applicable to other business) on Copperstate. *Id.* at § 4(B). The fee is called a "Town of Snowflake *Business License* Fee" (emphasis added), not a land use, impact, development, or similar fee. *Id.* The Facilities Agreement also does not provide any basis for what relates this fee to the impact of Copperstate's medical marijuana cultivation facility on the Town. Rather, it states that Copperstate, separate from the license fee, will pay directly for any enhanced police, fire, and paramedic services, though the Town does agree to provide regular services at no additional charge. *Id.* at § 2(C). There is also no indication in the Facilities Agreement that the money Copperstate will pay pursuant to the license fee will be used by the Town to offset any additional costs or impact resulting from the proposed cultivation facility. Finally, Town correspondence referenced the Facilities Agreement as a "Revenue Agreement," bolstering the

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maximum of five thousand dollars per year and a one-year term). Ultimately, whether the license fee is a true license fee or instead a tax does not change the analysis in this report because the requirements discussed in Part II(B), *infra*, apply equally to license taxes and fees.

In addition, although A.R.S. § 9-463.05 allows municipalities to impose development fees to offset certain costs, that statute contains significant procedural requirements that clearly were not contemplated by the Town and Copperstate when entering into the Facilities Agreement. And even if those requirements were followed, fees imposed under that statute must "not exceed a proportionate share of the cost of necessary public services," must "be based on the same level of service provided to [an] existing development," and cannot be used for things such as acquisition, repair, maintenance, upgrades, or administrative costs, among other things. *See id.* § 9-463.05(B)(3)-(5).

conclusion that the purpose of the license fee is to generate general-purpose revenue for the Town. For these reasons, the license fee appears to be a tax under § 9-240(B)(18).

B. If The License Fee Is a Tax or Fee, the Town Council Appears to Have Contravened State Law.

The Town Council's imposition of the license fee may violate the Equal Privileges and Immunities Clause of the Arizona Constitution because it appears to be an *ad hoc* tax applicable only to Copperstate, rather than a license tax that applies to any person carrying on the business of medical marijuana cultivation in the Town.[6]

The Equal Privileges and Immunities Clause "protect[s] against government action that is arbitrary, irrational, or not reasonably related to furthering a legitimate state purpose." *Coleman v. City of Mesa*, 230 Ariz. 352, 362 ¶ 43 (2012) (discussing equal protection and due process principles). That clause provides:

> No law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations.

Ariz. Const. art. II, § 13. This provision has been "construed . . . as applying the same standard as applies to [federal] equal protection claims." *Coleman*, 230 Ariz. at 361 ¶ 39.

"On[e] of the ways in which special privileges or immunities may be granted is by an unequal imposition of taxes." *Gila Meat Co. v. State*, 35 Ariz. 194, 199 (1929). A government entity "therefore, may not impose an excise tax which is not uniform, unless the classification

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[6] For purposes of this section's analysis, the imposition of the license tax (or fee) at issue is distinct from the individualized determination of whether to grant a SUP for a particular parcel under Snowflake Town Code § 4-5-3 and the factors listed in § 10-8-6 or other factors that the Town may adopt in the future. It is also distinct from the determination to impose a development fee under A.R.S. § 9-463.05, or a similar type of fee, which necessarily involves an individualized determination for the particular land and proposed use at issue, and this section assumes that the fee is not a development fee for the reasons discussed in note 5, *supra*.

upon which the lack of uniformity is based is . . . some principle which may reasonably promote the public health, safety or welfare." *Id.* (citations and internal quotation marks omitted).[7] Stated differently, "a legislative tax classification does not violate the equal protection clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Brink Elec. Const. Co. v. Ariz. Dep't of Revenue*, 184 Ariz. 354, 362 (App. 1995) (citation and internal quotation marks omitted).

In *Gila Meat Co.*, the license fee for slaughterhouses differentiated between slaughterhouses based on whether they were located within a certain distance a town and, if so, the population of the town. 35 Ariz. at 195-96. The court held the tax at issue unconstitutional because it "impose[d] different taxes upon persons engaged in the same business, without such difference being based upon a reasonable classification for purposes of the public health, safety, or general welfare, and that it does in effect grant to certain citizens privileges and immunities which are not granted to others similarly situated on equal terms." *Id.* at 202.

Here, the issue is more straightforward than in *Gila Meat Co.* The Town negotiated "[Business] License fee schedules" on an *ad hoc* basis for each individual cultivation facility.[8]

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[7] *See also US W. Commc'ns, Inc. v. City of Tucson*, 198 Ariz. 515, 526-27 ¶¶ 44-45 (App. 2000) (recognizing the continuing validity of *Gila Meat* but finding that the tax at issue did not violate Equal Privileges and Immunities); *Gosnell Dev. Corp. v. Ariz. Dep't of Rev.*, 154 Ariz. 539, 541 (App. 1987) (citing *Gila Meat* and stating that "taxing authorities treating taxpayers in the same class differently . . . violate their rights to equal protection under the law"); *Roseland v. City of Phoenix*, 14 Ariz. App. 117, 121 (1971) ("[U]nder general law the burden imposed shall fall alike on all business or parties in the same situation." (citation and internal quotation marks omitted)).

[8] Separately, the Town entered into a Medical Marijuana Cultivation Facilities Agreement and granted an SUP to Mountain Time Management, LLC ("Mountain Time"). That agreement is dated July 1, 2016. The Town also reapproved this agreement and SUP on or about August 12. The Mountain Time agreement provides for a "[Business] License Fee payment schedule" at Section 5. Its payment schedule is as follows:

There is no uniformity of taxes, and there are no "classification[s] upon which the lack of uniformity is based." *Gila Meat Co.*, 35 Ariz. at 199. This *ad hoc* imposition provides no indication what license fee would apply to a future landowner who wishes to cultivate medical marijuana; instead it appears that, like Copperstate and Mountain Time, such a person would have to negotiate a unique tax or fee burden with the Town. In other words, each grower obtains a privilege or immunity to pay a particular business license fee in connection with growing medical marijuana that is not available to other citizens or corporations "upon the same terms." Ariz. Const. art. II, § 13.[9]

The Town likely could avoid this Equal Privileges and Immunities issue by establishing a single, uniformly applicable business-license-fee payment schedule for medical marijuana cultivation. That schedule could also contain reasonable classifications that differentiate

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OUTDOOR GROW (one grow per season)
0 to 20 net acres: $3,000 per net acre per year

GREENHOUSE GROW (2 grows per season)
0 - 5 net acres $6,000 per net acre
5.1 - 10 net acres $14,000 per net acre
10.1 - 20 net acres $20,000 per net acre

INDOOR GROW: Cultivating Space (3 grows per season)
0-5 net acres $9,000 per net acre
5.1 - 10 net acres $21,000 per net acre
10.1 - 20 net acres $25,000 per net acre

The Mountain Time agreement, unlike the Copperstate Facilities Agreement, provides no dollar-for-dollar offset if the Town raised sales taxes, use taxes, or other taxes or fees, further showing that each grower's license fee is negotiated uniquely between the grower and the Town.

[9] A business license fee arrangement such as the one at issue here—or a single, uniformly applicable business license fee schedule—nevertheless may be a special law in violation of Article IV, pt. 2, § 19. *See Gallardo v. State*, 236 Ariz. 84, 88 ¶ 10 (2014) ("Special laws favor one person or group and disfavor others"). Although the applicability of this constitutional provision to municipalities has not been decided directly, courts have analyzed municipal ordinances as if it does apply. *See City of Tucson v. Grezaffi*, 200 Ariz. 130, 138-39 ¶¶ 21-23 (App. 2001); *Bonito Partners, LLC v. City of Flagstaff*, 229 Ariz. 75, 82 ¶¶ 24-26 (App. 2012); *see also Puppies 'N Love v. City of Phoenix*, 116 F. Supp. 3d 971, 997-98 (D. Ariz. 2015).

between categories of growers, so long as it was available "upon the same terms" to all citizens or corporations who are legally permitted to grow marijuana, not imposed on an *ad hoc* basis through individualized negotiations. *See also* A.R.S. § 9-499.15 ("A municipality may not levy or assess any new taxes or fees or increase existing taxes or fees pursuant to statute on a business without complying with this section.").

C. Alternatively, if the License Fee Payment Schedule Is a Monetary Exaction for Granting the SUP, then It Likely Violates the Arizona Takings Clause.

Alternatively, if the Town's license fee is a condition for granting the SUP, rather than a tax or fee, it would nonetheless raise serious issues under the Arizona Constitution's Takings Clause, Ariz. Const. art. II, § 17. If the Town imposes a tax or fee, as discussed in the previous section, the takings issue discussed here is inapplicable. *See Koontz*, 133 S. Ct. at 2600-01.

Under analogous authority interpreting the federal Takings Clause, U.S. Const. Amd. V, a government body cannot require a landowner to surrender property as a condition of approving a land use unless the requirement has an "essential nexus" and "rough proportionality" to the impact the proposed use will have on the government and surrounding area. *See Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994); *see generally Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale*, 187 Ariz. 479, 485-86 (1997) (discussing *Nollan* and *Dolan*). In *Koontz*, the United States Supreme Court held that "monetary exactions"—the requirement of a monetary payment in return for a permission to engage in a particular use of land—also "must satisfy the nexus and rough proportionality requirements of *Nollan* and *Dolan*." 133 S. Ct. at 2599.

The Arizona Constitution and statutes similarly provide protections against takings. The constitution states in part that "[n]o private property shall be taken or damaged for public . . . use without just compensation having first been made." Ariz. Const. art. II, § 17. This provision

appears to provide ***at least as much protection*** as the federal Takings Clause. *Cf. Bailey v. Myers*, 206 Ariz. 224, 229 ¶ 20 (App. 2003) (noting that "[t]he federal constitution provides considerably less protection against eminent domain than our [Arizona] Constitution provides"). In addition, A.R.S. § 9-500.13 ***expressly requires*** the Town to comply with *Nollan* and *Dolan*.

"Under *Nollan* and *Dolan* the government may choose whether and how a permit applicant is required to mitigate the impacts of a proposed development, but it may not leverage its legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts." *Koontz*, 133 S. Ct. at 2595. The nexus requirement inquires whether the condition "further[s] the end advanced as [its] justification." *Nollan,* 483 U.S. at 837. Proportionality requires the governmental entity to make an "individualized determination" that the condition is "related both in nature and extent to the impact" of the proposed use, but does not require a "precise mathematical calculation." *Dolan*, 512 U.S. at 391.

Here, the Town's license fee does not appear to have an essential nexus and rough proportionality to any impact of the cultivation of medical marijuana. For one, it is not clear how the particular license fee schedules further any ends other than simply obtaining additional revenue for the Town, in part because the Facilities Agreement does not state how the funds Copperstate pays will be used. In addition, there is no record on which to conclude that the amount of the fees is related to the particular impact of the proposed use. Indeed, the Copperstate fee schedule starts out at $10,000 per net acre, eventually increases to $30,000 per net acre, and ultimately drops to an average of $20,000 per acre. The Copperstate fee schedule is also completely different from the schedule for Mountain Time, e.g. Mountain Time does not receive an offset from future taxes and fees. *See* note 8, *supra*. Moreover, the Facilities Agreement itself states (at § 2(C)) that Copperstate is required to pay directly for any enhanced

police, fire, and paramedic services, though the Town does agree to provide regular services at no additional charge. The nexus and proportionality requirements thus do not appear to be met.

Conclusion

Many of the issues raised in the Request are beyond the narrow scope of A.R.S. § 41-194.01. For the reasons stated above, however, the Town Council may have violated the Equal Privileges and Immunities Clause of the Arizona Constitution or, alternatively, the Arizona Constitution's Takings Clause when it approved a license fee payment schedule unique to Copperstate Farms in the Facilities Agreement.

Michael G. Bailey
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