

1 INTERIM STUDY PROPOSAL 2015-072

2 State of Arkansas

As Engrossed: H3/19/15

3 90th General Assembly

A Bill

4 Regular Session, 2015

HOUSE BILL 1111

5
6 By: Representatives Sabin, Bragg, House, E. Armstrong, M.J. Gray, G. Hodges, *Baltz, Jett*

7 Filed with: House Committee on Agriculture, Forestry, and Economic Development
8 pursuant to A.C.A. §10-3-217.

For An Act To Be Entitled

9
10 AN ACT TO CREATE THE PARTNERSHIP FOR PUBLIC
11 FACILITIES AND INFRASTRUCTURE ACT; TO REGULATE
12 PUBLIC-PRIVATE PARTNERSHIPS FOR PUBLIC FACILITIES AND
13 INFRASTRUCTURE; AND FOR OTHER PURPOSES.
14

Subtitle

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16
17 TO CREATE THE PARTNERSHIP FOR PUBLIC
18 FACILITIES AND INFRASTRUCTURE ACT; AND TO
19 REGULATE PUBLIC-PRIVATE PARTNERSHIPS FOR
20 PUBLIC FACILITIES AND INFRASTRUCTURE.
21

22
23 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:
24

25 *SECTION 1. Arkansas Code Title 22 is amended to add an additional*
26 *chapter to read as follows:*

CHAPTER 10

PARTNERSHIP FOR PUBLIC FACILITIES AND INFRASTRUCTURE ACT

Subchapter 1 – General Provisions

22-10-101. Title.

31
32
33 *This chapter shall be known and may be cited as the “Partnership for*
34 *Public Facilities and Infrastructure Act”.*

22-10-102. Legislative findings.

1 The General Assembly finds that:

2 (1) There is a public need for the timely acquisition, design,
3 construction, improvement, renovation, expansion, equipping, maintenance,
4 operation, implementation, and installation of public infrastructure and
5 government facilities within the state that serve a public purpose;

6 (2) The public need for government facilities and public
7 infrastructure may not be satisfied by existing methods of procurement and
8 the funding methods available to state and local government jurisdictions
9 within the state;

10 (3) There are inadequate resources to develop public
11 infrastructure and government facilities for the benefit of citizens of the
12 state, and there is demonstrated evidence that public-private partnerships
13 can promote the timely and cost-efficient development of public
14 infrastructure and governmental facilities, provide alternative and
15 innovative funding sources to governmental entities, and allow governmental
16 entities to leverage and supplement the developmental cost of the public
17 infrastructure or governmental facility, through private funding and
18 participation by the private sector in governmental incentive and tax
19 programs that are not otherwise available to governmental entities; and

20 (4) The necessity exists for authorizing the formation of
21 public-private partnerships that may result in the ability to develop public
22 infrastructure and governmental facility private projects in a more timely
23 and cost-efficient manner, thereby resulting in increased benefits to the
24 public safety and welfare of the citizens of the state and substantial cost
25 benefits to the governmental entities and the public.

26
27 22-10-103. Definitions.

28 As used in this chapter:

29 (1) "Comprehensive agreement" means a final written agreement
30 between a private entity and a public entity that is executed under § 22-10-
31 303, provides for the development of a qualifying project, and addresses all
32 issues related to the qualifying project;

33 (2) "Develop", "developed", and "development of" mean the
34 planning, designing, developing, ownership, financing, leasing, acquisition,
35 installation, construction, operation, maintenance, or expansion of a
36 qualifying project;

1 (3) "Interim agreement" means a preliminary written agreement
2 between a private entity and a public entity that is executed under § 22-10-
3 302, identifies the development, scope, and feasibility of a qualifying
4 project, and addresses all issues related to the qualifying project;

5 (4) "Private entity" means a natural person, corporation,
6 general partnership, limited liability company, limited partnership, joint
7 venture, business trust, public benefit corporation, nonprofit entity, and
8 other business entity;

9 (5) "Public entity" means one (1) or more of the following:

10 (A) A department of the state;

11 (B) An agency of the state;

12 (C) A board or commission of the state;

13 (D) A federal governmental entity; and

14 (E) A political subdivision of the state, including
15 without limitation a city, county, institution of higher education, water
16 authority, public facilities board, or other political subdivision or
17 affiliate of an entity listed in this subdivision (5)(E);

18 (6) "Publish" or "published" means the publication by a public
19 entity of a request for proposals one (1) time each week for three (3)
20 consecutive weeks in:

21 (A) A newspaper of statewide circulation; and

22 (B) Either:

23 (i) In a statewide construction industry trade
24 magazine; or

25 (ii) On a website approved by the public entity that
26 is regularly subscribed to by members of the construction and development
27 industry;

28 (7) "Qualified respondent" means the private entity selected as
29 the most qualified entity to undertake a qualifying project that is the
30 subject of a request for proposals issued under this chapter;

31 (8) "Qualifying project" means a capital development or
32 improvement of any nature that:

33 (A) Benefits a public entity, including without
34 limitation a vehicle parking facility, power generation facility, fuel supply
35 facility, combined heating and power facility, central utility plant
36 facility, distributed generation facility, oil or gas pipeline, water supply

1 facility, water treatment intake and distribution facility, waste water
 2 treatment and collection facility, waste treatment facility, hospital,
 3 library, medical or nursing care facility, recreational facility, city hall
 4 or related administrative facility, law enforcement facility, fire department
 5 facility, public administrative office, toll road, correctional facility,
 6 technology infrastructure facility, public building, or other similar
 7 facility currently available or to be made available to a public entity for
 8 public use, including without limitation a structure, parking area,
 9 appurtenance, and other related or unrelated infrastructure that might
 10 otherwise be described in a comprehensive agreement; and

11 (B) Has one (1) or more of the following characteristics:

12 (i) It is developed using a long-term operations and
 13 maintenance agreement, management agreement, or services agreement entered
 14 into with a private entity;

15 (ii) It is designed and built in whole or in part by
 16 a private entity;

17 (iii) It is a capital development or improvement in
 18 which a private entity:

19 (a) Invests its own capital or third-party
 20 capital arranged by the private entity;

21 (b) Sources or uses indebtedness, available
 22 funds, revenues, or financial or tax incentives to fund the project; or

23 (c) Provides other consideration in the form
 24 of goods or services to the public entity to fund the project;

25 (iv) It is owned in whole or in part by a private
 26 entity for the benefit of the public entity;

27 (v) It involves real or personal property owned by a
 28 public entity that is sold, leased, or exchanged with a private entity for
 29 leaseback or for use by the public entity; or

30 (vi) It is a project as defined by the Office of
 31 State Procurement;

32 (9) "Request for proposals" means a notice that is issued by a
 33 public entity announcing the public entity's interest in developing a
 34 qualifying project and seeking proposals from private entities to develop the
 35 qualifying project that identifies without limitation the following:

1 (A) The anticipated scope and purpose of the qualifying
2 project;

3 (B) The financial and nonfinancial benefits related to the
4 qualifying project;

5 (C) The proposed timeline under which the qualifying
6 project is to be completed; and

7 (D) All other issues that the public entity determines are
8 necessary to accomplish the qualifying project; and

9 (10) "Revenues" means the rates, revenues, income, earnings,
10 user fees, lease payments, service payments, other available funds, and other
11 revenue and cash flow of any nature arising out of or in connection with the
12 development of a qualifying project, including without limitation the funds
13 derived from the operation of a qualifying project or otherwise provided by
14 the parties as stated in the comprehensive agreement.

15
16 22-10-104. Construction.

17 (a) This chapter shall be liberally construed to effectuate its
18 purpose.

19 (b)(1) Except as limited by the Arkansas Constitution, this chapter
20 exclusively governs the manner and procedures by which a qualifying project
21 may be developed by and between a public entity and a private entity.

22 (2) If this chapter conflicts with any other state law, then
23 this chapter governs with respect to the manner and procedures by which a
24 qualifying project may be developed by and between a public entity and a
25 private entity.

26
27 Subchapter 2 – Proposals for Qualifying Projects

28
29 22-10-201. Requests for proposals.

30 (a)(1) A public entity considering the development of a qualifying
31 project shall prepare and publish a request for proposals.

32 (2)(A) The public entity may specify a period of time during
33 which responses to the request for proposals may be submitted by private
34 entities.

35 (B) However, the time allowed for responses to a request
36 for proposals under this chapter shall be at least sixty (60) days from the
37 date the request for proposals is published.

1 (b)(1) If a proposed qualifying project may materially affect the
2 governmental operations of another public entity, then the public entity
3 proposing the qualifying project shall provide written notice to each
4 potentially affected public entity before the request for proposals is
5 published.

6 (2) If the public entity and the other affected public entities
7 agree to pursue a qualifying project, the public entities may jointly issue
8 the request for proposals and undertake the qualifying project.

9 (c)(1) A public entity shall review each proposal submitted in
10 response to a request for proposals to determine whether the proposal
11 fulfills the goals and purposes of the public entity and the potential
12 qualifying project.

13 (2) In assessing the proposals submitted in response to the
14 request for proposals, a public entity may interview one (1) or more of the
15 private entities submitting a response to determine which entity is the
16 qualified respondent.

17 (d) A public entity may select the qualified respondent to undertake a
18 qualifying project based on a variety of factors, including without
19 limitation:

20 (1) The cost of the potential qualifying project as proposed by
21 the private entity;

22 (2) The general reputation, industry experience, and financial
23 capacity of the private entity;

24 (3) The design of the qualifying project as proposed by the
25 private entity;

26 (4) The plan of finance proposed by the private entity;

27 (5) Local citizens' comments;

28 (6) Comments from other public entities;

29 (7) The benefits to the public of the qualifying project as
30 proposed by the private entity;

31 (8) The public entity's participation in a minority business
32 enterprise plan adopted by the public entity;

33 (9) The private entity's plan to employ local contractors and
34 residents; and

1 (10) Any other factor that the public entity determines would be
2 useful in assessing the proposals submitted in response to the request for
3 proposals.

4 (e)(1) A public entity is not required to determine or select the
5 qualified respondent based on the lowest project development cost or life
6 cycle cost submitted by a private entity.

7 (2) However, a public entity may consider cost as one (1) factor
8 in evaluating the submitted proposals and selecting the qualified respondent.

9 (f) A public entity may:

10 (1) Reject all proposals submitted in response to a request for
11 proposals;

12 (2) Amend or modify the public entity's request for proposals;

13 (3) Publish an amended request for proposals; and

14 (4) Cease further development of a qualified project any time
15 before entering into an interim agreement with the qualified respondent.

16 (g) After selecting the qualifying respondent and sending written
17 notice to the qualified respondent of its selection, a public entity shall
18 provide written notice to all private entities that submitted a proposal in
19 response to the public entity's request for proposals within ten (10) days of
20 notifying the qualified respondent of its selection as the qualified
21 respondent.

22
23 22-10-202. Unsolicited proposals.

24 (a) A public entity shall not solicit or request a proposal from a
25 private entity to develop a qualifying project that is not procured under §
26 22-10-201.

27 (b)(1) However, a public entity may receive and consider unsolicited
28 ideas and development concepts from a private entity or another public
29 entity.

30 (2) If a public entity decides to pursue an unsolicited idea or
31 development concept, the public entity shall publish a request for proposals
32 under § 22-10-201.

33
34 Subchapter 3 – Contracts Between Public Entity and Private Entity

35
36 22-10-301. Procurement requirements.

1 A public entity may enter into an interim agreement or a comprehensive
2 agreement only in accordance with this subchapter.

3
4 22-10-302. Interim agreement.

5 (a)(1) Except as otherwise provided in this subsection, after a public
6 entity has selected the qualified respondent pursuant to a request for
7 proposals, the public entity and the qualified respondent shall negotiate an
8 interim agreement.

9 (2) A public entity may enter into an interim agreement with the
10 qualified respondent either before or in connection with the negotiation of a
11 comprehensive agreement under § 22-10-303.

12 (3)(A)(i) If an interim agreement is necessary to develop a
13 qualifying project and an interim agreement cannot be negotiated and executed
14 within sixty (60) days after the selection of the qualified respondent or
15 within the time period mutually agreed to by the public entity and the
16 qualified respondent, the public entity may begin negotiations with the next
17 most qualified private entity that submitted a proposal in response to the
18 request for proposals.

19 (ii) A public entity is not required to republish
20 the request for proposals before beginning negotiations with the next most
21 qualified private entity under subdivision (a)(3)(A)(i) of this section.

22 (B) If an interim agreement is not necessary to develop a
23 qualifying project, the public entity and the qualified respondent shall
24 negotiate a comprehensive agreement under § 22-10-303.

25 (4)(A) Before a public entity may enter into an interim
26 agreement under this section, the public entity shall contract with an
27 attorney and a certified public accountant or other financial or economics
28 professional to provide a written evaluation of the proposed qualifying
29 project.

30 (B) A written evaluation provided by a certified public
31 accountant or other financial or economics professional under subdivision
32 (a)(4)(A) of this section shall include without limitation the certified
33 public accountant's or other financial or economics professional's
34 independent assessment of the financial viability of the proposed qualifying
35 project, identifying all preliminary costs, financial liabilities,
36 advantages, and disadvantages of the qualifying project.

1 (C) A written evaluation provided by an attorney under
2 subdivision (a)(4)(A) of this section shall include the attorney's
3 independent assessment of the terms and conditions under which the proposed
4 qualifying project will be developed.

5 (D) An attorney, certified public accountant, or other
6 financial or economics professional providing a written evaluation under this
7 subsection may be a public employee of the public entity undertaking the
8 qualifying project or a private person who has current professional liability
9 insurance in an amount determined to be necessary by the public entity.

10 (b) An interim agreement entered into under this section may:

11 (1) Allow the private entity to commence activities and perform
12 tasks for which it shall be compensated relating to the proposed qualifying
13 project, including without limitation project planning and developing, design
14 and engineering, environmental analysis and mitigation, surveying, and
15 ascertaining the availability of financing for the proposed qualifying
16 project;

17 (2) Establish the process and timing of the negotiation of the
18 comprehensive agreement; and

19 (3) Contain any other provisions related to the development of
20 the proposed qualifying project that are agreed upon by the public entity and
21 the private entity.

22
23 22-10-303. Comprehensive agreement.

24 (a)(1) If a public entity and the qualified respondent have entered
25 into an interim agreement, agree on the findings and conclusions stated in
26 the interim agreement, and desire to proceed with the development of the
27 qualifying project, the public entity and qualified respondent shall
28 negotiate and enter into a comprehensive agreement.

29 (2) If it is unnecessary for a public entity and the qualified
30 respondent to enter into an interim agreement, the public entity and the
31 qualified respondent shall negotiate and enter into a comprehensive agreement
32 following selection of the qualified respondent.

33 (3) Before developing or operating the qualifying project, the
34 qualified respondent shall enter into a comprehensive agreement with the
35 public entity.

36 (b)(1) Before a public entity may enter into a comprehensive agreement

1 under this section, the public entity shall contract with an attorney to
2 negotiate the relevant agreements and a certified public accountant or other
3 financial or economics professional to provide a written evaluation of the
4 proposed comprehensive agreement.

5 (2) The attorney with which the public entity contracts under
6 subdivision (b)(1) of this section shall negotiate the contracts and
7 agreement related to the development of the qualifying project, including
8 without limitation the revenue contracts, construction contracts, management
9 contracts, services contracts, and other agreements related to the qualifying
10 project.

11 (3) The written evaluation required under subdivision (b)(1) of
12 this section shall include the certified public accountant's or other
13 financial or economics professional's independent assessment of the costs of
14 the qualifying project, the financial viability of the qualifying project,
15 and all other financial and operating assumptions related to the qualifying
16 project.

17 (4) A certified public accountant or other financial or
18 economics professional providing a written evaluation under this subsection
19 may be a public employee of the public entity undertaking the qualifying
20 project or a private person who has current professional liability insurance
21 in an amount determined to be necessary by the public entity.

22 (5) The fees and expenses associated with engaging an attorney,
23 certified public accountant, or other financial or economics professional
24 under this section may be included in the costs of the qualifying project.

25 (c) The comprehensive agreement shall include without limitation the
26 following:

27 (1) A thorough description of the duties of the public entity
28 and the qualified respondent in relation to the development and operation of
29 the qualifying project;

30 (2) Dates and schedules for the completion of the qualifying
31 project, including any available extensions or renewals of the qualifying
32 project;

33 (3) A pro forma analysis or budget under which the qualifying
34 project shall be developed, financed, constructed, operated, and maintained;

1 (4) The source of all revenues derived from the operation and
2 maintenance of the qualifying project and any process for modifying the
3 revenues during the term of the comprehensive agreement;

4 (5) Financing and funding sources for the qualifying project and
5 any contractual provisions related to the financing and funding sources for
6 the qualifying project;

7 (6) A copy of each contract related to the development of the
8 qualifying project;

9 (7) Reimbursements to be paid to the public entity for services
10 provided by the qualified respondent, if any;

11 (8) A process for the review of plans and specifications for the
12 qualifying project by the public entity and the engineering and architectural
13 consultants of the public entity, if any;

14 (9) A process for the periodic and final inspection of the
15 qualifying project by the public entity or its designee to ensure that the
16 qualified respondent's development activities comply with the comprehensive
17 agreement;

18 (10) For the components of the qualifying project that involve
19 construction, provisions for the:

20 (A)(i) Delivery of maintenance, payment, and performance
21 bonds in the amounts that may be specified by the public entity in the
22 comprehensive agreement.

23 (ii) However, a payment bond related to a qualifying
24 project shall:

25 (a) Be based only on the construction costs of
26 the qualifying project; and

27 (b) Comply with the requirements of § 18-44-
28 503; and

29 (B) Posting and delivery of all other bonds, letters of
30 credit, or other forms of security acceptable to the public entity in
31 connection with the development of the qualifying project;

32 (11) Submission to the public entity by the qualified respondent
33 of proof of workers compensation, property casualty, general liability, and
34 other policies of insurance related to the development and operation of the
35 qualifying project in the amounts and subject to the terms that may be
36 specified by the public entity in the comprehensive agreement;

1 (12) A process for the public entity's monitoring of the
2 practices of the qualified respondent to ensure that the qualifying project
3 is properly developed, constructed, operated, and maintained;

4 (13) The filing by the qualified respondent of appropriate
5 financial statements with the public entity related to the operations of the
6 qualifying project within the timeframes established in the comprehensive
7 agreement; and

8 (14) Policies and procedures governing the rights and
9 responsibilities of the public entity and the qualified respondent if the
10 comprehensive agreement is terminated according to the terms of the
11 comprehensive agreement or as the result of a default under the terms of the
12 comprehensive agreement.

13 (d) A modification of or an amendment to the terms of the
14 comprehensive agreement shall be:

15 (1) Agreed upon by the public entity and the qualified
16 respondent; and

17 (2) Added to the comprehensive agreement by written amendment.

18
19 22-10-304. Financing of a qualifying project.

20 (a)(1) Financing of a qualifying project may be in the amounts and
21 upon the terms and conditions stated in the interim agreement or the
22 comprehensive agreement.

23 (2)(A) A qualifying project may be financed by the qualified
24 respondent or the public entity, or both, and the qualified respondent and
25 public entity may utilize any funding resources available to them, including
26 without limitation to the fullest extent permitted by applicable law, issuing
27 debt, equity, or other securities or obligations, entering into leases,
28 accessing designated trust funds, and borrowing or accepting grants from a
29 state infrastructure bank.

30 (B) Debt issued for the development of a qualifying
31 project may be evidenced by the issuance of taxable or tax-exempt bonds,
32 promissory notes, lease purchase agreements, or other evidences of
33 indebtedness that are specified in the comprehensive agreement.

34 (3) Financing for a qualifying project may be secured by a
35 pledge of, security interest in, or lien on the real or personal property of
36 the public entity or the qualified respondent, including without limitation

1 any property interests in the qualifying project or the qualifying project
 2 revenues.

3 (b)(1) The public entity may take action to obtain federal, state, or
 4 local assistance for a qualifying project that serves the public purpose of
 5 this chapter, including without limitation entering into any contracts
 6 required to receive such assistance.

7 (2) All or any portion of the costs of a qualifying project may
 8 be paid, directly or indirectly, from the proceeds of a grant or loan made by
 9 a local government, the state government, the federal government, or an
 10 agency or instrumentality of a local government, the state government, or the
 11 federal government if it would serve the public purpose of this chapter.

12 (c) In addition to the financing methods allowed under subsection (a)
 13 of this section, a qualifying project may be financed through:

14 (1) Capital provided by either the public entity or the
 15 qualified respondent;

16 (2) The available funds of the public entity;

17 (3) The operating expenses of the public entity;

18 (4) Revenues of the qualifying project;

19 (5) Any tax credits or other incentives for which the qualifying
 20 project or the qualified respondent may qualify;

21 (6) Governmental or third-party grants; and

22 (7) Any other available capital or funding sources of the public
 23 entity or the qualified respondent.

24
 25 22-10-305. Service contracts.

26 A public entity may contract with the qualified respondent for the
 27 delivery of services to be provided as part of a qualifying project in
 28 exchange for service payments or other consideration that the public entity
 29 deems appropriate.

30
 31 Subchapter 4 – Other Powers and Responsibilities

32
 33 22-10-401. Eminent domain – Dedication.

34 (a)(1) A public entity may exercise its right of eminent domain under
 35 applicable law in connection with the development of a qualifying project.

1 (2) The power of eminent domain shall not be delegated to a
2 private entity with respect to a qualifying project commenced or proposed
3 under this chapter.

4 (3) Damages awarded to a third party in an eminent domain action
5 may be included in the development budget for the qualifying project.

6 (b)(1) A public entity may dedicate any real or personal property
7 interest, including land, improvements, and tangible personal property,
8 through lease, sale, or otherwise, to the qualified respondent to facilitate
9 a qualifying project if so doing will serve the public purpose of this
10 chapter.

11 (2) The consideration for the dedication, lease, sale, or
12 exchange of any real or personal property interest under subdivision (b)(1)
13 of this section may include an agreement by the qualified respondent to
14 operate or develop the qualifying project or provide other services to the
15 public entity.

16 (3) The property interests that a responsible public entity may
17 convey to the qualified respondent in connection with a dedication under this
18 section may include licenses, franchises, easements, or other rights or
19 interests that the public entity deems appropriate.

20
21 22-10-402. Sovereign immunity.

22 This chapter does not waive the sovereign immunity of the public entity
23 or the officers or employees of the public entity under state law.

24
25 22-10-403. Open meetings – Disclosure of records.

26 (a) This chapter does not abrogate the obligation of a public entity
27 or the Office of State Procurement to comply with the Freedom of Information
28 Act of 1967, § 25-19-101 et seq.

29 (b) However, records that would otherwise be exempt from disclosure
30 under the Freedom of Information Act of 1967, § 25-19-101 et seq., remain
31 exempt when in the custody or control of a public entity or the office.

32
33 22-10-404. Transparency.

34 A public entity shall publish on its website:

35 (1) A description of each proposed qualifying project, the
36 intended benefits of each proposed qualifying project, a proposed schedule

1 for each qualifying project, and any other information that is essential to
2 allow a public review of each proposed qualifying project;

3 (2) Each request for proposals published by a public entity; and

4 (3) A copy of each negotiated interim agreement and
5 comprehensive agreement before the interim agreement or comprehensive
6 agreement has been executed.

7
8 Subchapter 5 – Administration by the Office of State Procurement

9
10 22-10-501. Review and approval.

11 The Office of State Procurement shall review and approve each
12 qualifying project before the public entity and qualified respondent execute
13 the comprehensive agreement.

14
15 22-10-502. Powers and duties.

16 (a) The Office of State Procurement shall promulgate rules regarding
17 the definitions and guidelines related to the development of qualifying
18 projects under this chapter within one hundred eighty days (180) of the
19 effective date of this chapter.

20 (b) The guidelines promulgated under this section shall include
21 without limitation the following:

22 (1) Criteria for selecting qualifying projects to be undertaken
23 by a public entity;

24 (2) Criteria for selecting among competing proposals submitted
25 according to a request for proposals under § 22-10-201;

26 (3) Time lines for selecting a qualified respondent under the
27 process for requests for proposals under § 22-10-201;

28 (4) Guidelines for negotiating a comprehensive agreement; and

29 (5) Guidelines for allowing the accelerated selection of a
30 qualified respondent and the review and approval of a qualifying project that
31 is determined to be a priority by the Governor and is funded in whole or
32 substantial part by dedicated revenues.

33
34 /s/Sabin
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1 Referred by the Arkansas House of Representatives

2 Prepared by: VJF

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