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September 6, 2013

REPORT TO THE HONORABLE MAYOR
AND CITY COUNCIL

PUBLIC FACILITIES FINANCING PLAN UPDATE CONSIDERATIONS

INTRODUCTION

This Office has advised that the City update its Public Facilities Financing Plans (Financing Plans) annually to comply with statutory requirements, reflect increases or decreases in the actual costs of public facilities projects, changes to the scope and type of projects needed in the community, and changes to various Financing Plan assumptions to reflect current reality, thus ensuring the continual accuracy of the Financing Plans and reasonableness of the associated development fees. City Att'y Report 2011-28 (July 19, 2011); 1985 City Att'y MOL 205, 207 (85-44; Aug. 8, 1985). Although the Financing Plans have generally not been updated for several years, this fall you will be considering a number of Financing Plan updates. This memorandum is intended to explain the legal limitations that may exist going forward with the anticipated Financing Plan updates. This memorandum is also intended to provide guidance related to appropriate methodologies to calculate development fees to implement the updated Financing Plans.

OVERVIEW

As discussed in this memorandum, there is no legal distinction between an FBA and a DIF, other than the additional procedural requirements set forth in the FBA Ordinance that are applicable to fees adopted in communities identified as FBA communities. However, the practical difference is in the methodologies City staff uses to calculate the amount of the fees. In both "FBA communities" and "DIF communities," the City must ensure that it does not use a methodology that results in a fee that is not reasonably related to the impacts of new development in the community. Specifically, the Council should make certain that Financing Plans in "FBA communities" do not result in fees that are greater than the burdens posed by new development. On the other hand, the Council should be aware of the potential for not capturing the full cost to provide public facilities to new development in "DIF communities." Additionally, potential general plan inconsistencies could exist when a community plan amendment is considered simultaneously with a Financing Plan where the community plan relies on the Financing Plan to implement public facilities policies. Furthermore, if a fee does not capture the full amount of the cost of public facilities attributable to new development, future projects may also be inconsistent with the General Plan unless additional fees are imposed on such projects on a case-by-case basis.

BACKGROUND

Currently, the City generally categorizes its communities as either a Facilities Benefit Assessment (FBA) community, or a Development Impact Fee (DIF) community.[1] *See e.g.*, General Plan, Figure PF-1 at PF-6. A brief overview of the history of FBAs and DIFs is helpful to understand how the City evolved into a City with these two financing categories.

Under the City's 1979 General Plan, the City was divided into three "tiers" of growth: (1) "urbanized," which consisted of established and developed neighborhoods and the Downtown core; (2)"planned urbanizing," which consisted of newly planned and developing communities; and (3) "future urbanizing," which were largely vacant areas requiring a shift to "planned urbanizing" before being developed. In 1980, the City adopted the "Procedural Ordinance for Financing of Public Facilities in Planned Urbanizing Areas" (FBA Ordinance), which established procedures to implement the 1979 General Plan Policy that certain public facilities should be financed by special assessment proceedings, consideration from developers, the City's General Fund or some combination thereof. San Diego Ordinance O-15318 (Aug. 25, 1980). The FBA Ordinance set forth a procedure to impose special assessments on lands within the planned urbanizing areas to finance public facilities. *Id.*

In 1984, the California Court of Appeal upheld the FBA Ordinance as a valid exercise of the City's police power. *J.W. Jones Cos. v. City of San Diego*, 157 Cal. App. 3d 745 (1984). In particular, the court held that the FBA Ordinance did not impose a tax, and was not subject to Proposition 13 requiring voter approval. *Id.* at 758. Subsequently, in 1987, the California Legislature adopted the Mitigation Fee Act, which sets forth procedures and requirements for adopting, imposing, challenging, and expending development fees. The Mitigation Fee Act applies to a "monetary exaction *other than a tax or special assessment*, whether established for a broad class of projects by legislation of general applicability or imposed on a specific project on an ad hoc basis, that is charged by a local agency to the applicant in connection with the approval of a development project for the purpose of defraying all or a portion of the cost of public facilities related to the development project . . . ." Cal. Gov't Code § 66000(b) (emphasis added). At that time, the City treated the FBA Ordinance as an ordinance imposing a special assessment not subject to the Mitigation Fee Act.

Then, in 1996, the voters passed Proposition 218, which added new requirements to the California Constitution related to special assessments. Adam U. Lindgren & Steven T. Mattas, California Land Use Practice § 18.11 at 859 (Cont. Ed. Bar 2012). Proposition 218 established procedures and requirements for the imposition of property-related fees and charges, but does not apply to "existing laws relating to the imposition of fees . . . *as a condition of property development*." Cal. Const. art XIIID, § 6; Cal. Const. art XIIID, § 1(b) (emphasis added). The FBA Ordinance at that time required payment of the FBA "upon the issuance of building permit(s) for development *or at such time as the Capital Improvement Program for the Area of Benefit in which the assessed land is located calls for commencement of construction of the Public Facilities Project*." O-15318 at 17 (emphasis added). Because the FBAs could have been payable simply by virtue of property ownership, rather than as a condition of property

[1] Some communities are identified as "Development Agreement" and "Future Urbanizing Area" communities, which are not discussed in this memorandum. City of San Diego General Plan, Public Facilities, Services and Safety Element, Figure PF-1 at PF-6 (Mar. 10, 2008).

development, this Office recently opined that the FBA Ordinance, as originally written, was subject to Proposition 218.[2] City Att'y Report 2011-28 at 8. Therefore, the FBA Ordinance was amended to only require payment of the FBA at the time of building permit issuance – as a condition of property development – consistent with the City's practice. San Diego Ordinance O-20100 (Oct. 11, 2011). In doing so, although called an "assessment," an FBA became a fee required purely as a condition of property development that is subject to the Mitigation Fee Act. *See* City Att'y Report 2011-28 at 9. Thus, there is no legal distinction between an FBA and a DIF, other than the additional procedural requirements set forth in the FBA Ordinance that are applicable to fees adopted in communities identified as FBA communities. The only legal requirement to comply with such additional procedures comes from the City's Municipal Code.[3] Additionally, in 2008, the City adopted a new General Plan, which explains that the planned urbanizing areas have been "largely completed" and that the City is now "a jurisdiction of primarily two tiers: Proposition A Lands (formerly the Future Urbanizing Areas) and the Urbanized Lands (formerly the Planned Urbanizing Areas and Urbanized Areas)." General Plan, Public Facilities, Services and Safety Element, at PF-4. Thus, the legal necessity for the FBA Ordinance, which is titled "Financing of Public Facilities in Planned Urbanizing Areas," has ended.

Although there is no legal distinction between an FBA and a DIF, the practical difference is in the methodologies City staff uses to calculate the amount of the two fees. There are numerous methodologies that could be used to calculate appropriate development fees for public facilities. However, it is this Office's understanding that the City typically uses one particular methodology in FBA communities, and another particular methodology in DIF communities. These methodologies and their implications are discussed in this memorandum.

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[2] It has been asserted that the FBA Ordinance has been found by the courts not to be subject to Proposition 218. However, in the only case addressing such an issue, *Barratt American Inc. v. City of San Diego*, 117 Cal. App. 4th 809, 820 (2004), the California Court of Appeal found that the Proposition 218 challenge to the FBA Ordinance was barred by the applicable statute of limitations and specifically declined to "reach the question whether the benefit assessment violates Proposition 218, or whether it is a fee or charge imposed as a condition of property development."

[3] As this Office has previously advised, the FBA Ordinance could be amended or repealed to remove additional procedural requirements. City Att'y Report 2011-28 at 10. Such additional procedures include, but are not limited to, an additional hearing to adopt a "Resolution of Intention" (SDMC § 61.2204), protest procedures (SDMC § 61.2206), filing a map of the Area of Benefit with the City Clerk and recording a Notice of Assessment with the County Recorder (SDMC § 61.2209), and filing release of liens with the County Recorder (SDMC § 66.2210(e)). To the extent that there are certain procedures that are still desirable, those procedures could be added to San Diego Municipal Code Chapter 14, Article 2, Division 6, where procedures for all other development impact fees are located.

ANALYSIS

Legally, there is no one specific methodology that must be used to calculate development fees. Legislatively-enacted, generally applicable fees (which include both FBAs and DIFs) are subject to the reasonable relationship test as codified in the Mitigation Fee Act. *See Ehrlich v. City of Culver City*, 12 Cal. 4th 854, 865-66 (1996). Specifically, the Mitigation Fee Act requires an agency to determine "how there is a reasonable relationship between the fee's use and the type of development project on which the fee is imposed" and "between the need for the public facility and the type of development project on which the fee is imposed." Cal. Gov't Code § 66001(a)(3)-(4); *Garrick Dev. Co. v. Hayward Unified Sch. Dist.*, 3 Cal. App. 4th 320, 334 (1992). Inherent in the reasonable relationship test is that new development cannot be made to pay for facilities that are not the result of the burdens posed by new development. Specifically, "[a] fee shall *not include the costs attributable to existing deficiencies* in public facilities, but may include the costs attributable to the increased demand for public facilities reasonably related to the development project in order to (1) refurbish existing facilities to maintain the existing level of service or (2) achieve an adopted level of service that is consistent with the general plan." Cal. Gov't Code § 66001(g) (emphasis added).

As discussed in the Background Section, no legal requirement remains to distinguish between what the City currently refers to as a "FBA" and what it refers to as a "DIF." The Mitigation Fee Act defines a "fee" as "a monetary exaction . . . that is charged by a local agency to the applicant in connection with approval of a development project for the purpose of defraying . . . the cost of public facilities related to the development project." Cal. Gov't Code § 66000(b). Both FBAs and DIFs are development impact fees, which are subject to the Mitigation Fee Act.

I. FEES IN BOTH "FBA COMMUNITIES" AND "DIF COMMUNITIES" MUST BE REASONABLY RELATED TO THE BURDENS POSED BY NEW DEVELOPMENT

A. FBA Fees

Historically, new development in "FBA communities" has paid for the full cost of needed public facilities in the community. The fees have been calculated by adding up the cost of the facilities needed to serve the community, and then dividing the cost of those facilities by the remaining development anticipated to occur in the community, as shown below:

► Cost of Facilities ÷ Units of Anticipated New Development = Fee

The following simplified example for the park portion of the fee is instructive in understanding the basis for such a methodology.

Example: A community consists of 5,000 units of existing development and 5,000 additional units of projected future development (10,000 total units at full development). Population at full anticipated development is 30,000.[4] Based on the General Plan standard of 2.8 acres of parks per 1,000 population, 84 acres of parks are required to serve the community. Each acre of park costs $1,000,000.

Using the City's historically applied methodology for calculating fees in FBA communities, the costs of the remaining park facilities needed to serve the community are divided by the remaining 5,000 units of projected development. If the Financing Plan for the community has been regularly updated to ensure that adequate facilities have been provided for the existing development (42 acres of parks currently exist, and 42 acres of additional parks are needed for new development), a fee of $8,400 per unit results, as shown below:

$$\blacktriangleright \quad \overbrace{(42 \text{ park acres x } \$1{,}000{,}000)}^{\text{Cost of Facilities}} \div \overbrace{5{,}000 \text{ units}}^{\text{Anticipated New Units}} = \overbrace{\$8{,}400 \text{ per unit}}^{\text{Fee}}$$

This methodology generally satisfies the legally required reasonable relationship test because existing development is adequately served with park facilities, and thus, the cost of the new facilities are attributable to new development only.

However, if the community currently only has 30 acres of parks, where the General Plan requires 42 acres of parks for the existing development, 54 additional acres of parks would be required (12 acres for existing development and 42 acres for new development) to serve the community at full development. Using the historically applied FBA methodology, the total remaining 54 acres of parks would be charged to new development resulting in a fee of $10,800 per unit, as shown below:

$$\blacktriangleright \quad \overbrace{(54 \text{ park ac. x } \$1{,}000{,}000)}^{\text{Cost of Facilities}} \div \overbrace{5{,}000 \text{ units}}^{\text{Anticipated New Units}} = \overbrace{\$10{,}800 \text{ per unit}}^{\text{Fee}}$$

In this instance, the $10,800 fee requires new development to partially pay for public facilities that are not related to new development, and thus, violates the required reasonable relationship test. To the extent that failure to adequately update a Financing Plan has resulted in public facility deficiencies for existing development, the methodology historically used in FBA communities is legally impermissible. *See* City Att'y Report 2011-28; 1985 City Att'y MOL at 207. Adjustments would need to be made to ensure that the fee is reasonably related to the burdens posed by new development only. Deficiencies attributable to existing development cannot be charged to new development, and thus alternative funding sources would need to be identified. This Office can provide further advice on proposed methodologies once they have been developed.

[4] Staff may determine actual population projections based on information from various sources. The population projection used here is solely hypothetical.

B. DIF Fees

Historically, unlike the fees in "FBA communities," fees in "DIF communities" use a different methodology to calculate fees. The fees have been calculated by adding up the cost of the facilities needed to serve the community, and then dividing the cost of those facilities by the total anticipated development – existing plus new – in the community, as shown below:

► Cost of Facilities ÷ (Total Existing + Anticipated New Units) = Fee

The following simplified example for the park portion of the fee is instructive in understanding the basis for such a methodology.

<u>Example</u>: A community consists of 5,000 units of existing development and 5,000 additional units of projected future development (10,000 total units at full development). Population at full anticipated development is 30,000. Based on the General Plan standard of 2.8 acres of parks per 1,000 population, 84 acres of parks are required to serve the community. Each acre of park costs $1,000,000.

Using the City's historically applied methodology for calculating park fees in DIF communities, the costs of the remaining park facilities needed to serve the community are divided amongst the 10,000 units of existing and new development. If the Financing Plan for the community has been regularly updated to ensure that adequate facilities have been provided for the existing development (42 acres of parks currently exist, and 42 acres of additional parks are needed for new development), using such a methodology, a fee of $4,200 per unit results, as shown below:

$$\blacktriangleright \quad \overbrace{(42\text{ acres} \times \$1{,}000{,}000)}^{\text{Cost of Facilities}} \div \overbrace{10{,}000\text{ units}}^{\substack{\text{Total Anticipated}\\ \text{Units}\\ \text{(Existing+New)}}} = \overbrace{\$4{,}200\text{ per unit}}^{\text{Fee}}$$

While this methodology ensures that new development is not impermissibly made to pay for public facilities attributable to existing development, it could increase deficiencies because the resulting fee does not capture the full cost of the facilities needed to serve new development. In this example, 42 acres of park are needed to serve the 500 units of projected future development, and the $4,200 per unit fee only provides for 21 acres of parks, as shown below:

$$\blacktriangleright \quad \overbrace{\$4{,}200\text{ per unit}}^{\substack{\text{Fee as Calculated}\\ \text{Above}}} \times \overbrace{5{,}000\text{ units}}^{\substack{\text{Anticipated}\\ \text{New Units}}} = \overbrace{\$21{,}000{,}000}^{\substack{\text{Total Fees}\\ \text{From New Units}}} \div \overbrace{\$1{,}000{,}000\text{ per ac.}}^{\substack{\text{Cost}\\ \text{Per Acre}}} = \overbrace{21\text{ ac.}}^{\substack{\text{Acres Paid For}\\ \text{by New Units}}}$$

This Office understands that this methodology has been used in an abundance of caution since many DIF communities have public facility deficiencies. However, again using the above example, if a community currently only has 30 acres of park, where 54 additional acres are needed, using the historically applied methodology, a fee of $5,400 per unit results, as shown below:

$$\blacktriangleright \quad \overbrace{(54 \text{ ac. x } \$1{,}000{,}000)}^{\text{Cost of Facilities}} \div \overbrace{10{,}000 \text{ units}}^{\text{Total Anticipated Units (Existing+New)}} = \overbrace{\$5{,}400 \text{ per unit}}^{\text{Fee}}$$

Under such a scenario, while the existing development is deficient 12 acres of park, 42 acres of park are still needed to serve the 5,000 units of projected future development, and the \$5,400 per unit fee only provides for 27 acres of the 42 acres of parks needed to serve the new development, as shown below:

$$\blacktriangleright \quad \overbrace{\$5{,}400 \text{ per unit}}^{\text{Fee as Calculated Above}} \text{ x } \overbrace{5{,}000 \text{ units}}^{\text{Anticipated New Units}} = \overbrace{\$27{,}000{,}000}^{\text{Total Fees From New Units}} \div \overbrace{\$1{,}000{,}000 \text{ per ac}}^{\text{Cost Per Acre}} = \overbrace{27 \text{ ac}}^{\text{Acres Paid For by New Units}}$$

Using this methodology, at full development, the community would have 57 acres of parks, where 84 acres are needed. This 27 acre deficiency is due both to the 12 acres of park that are attributable to the existing 5,000 units, plus an additional 15 acres due to the additional deficiencies created by the insufficient fee for the 5,000 units of new development. To capture the full amount of park costs attributable to new development, the methodology could instead identify only the additional park acreage needed to serve new development. In this example, 42 acres are needed to serve the 5,000 units of new development, resulting in a fee of \$8,400 per unit, as shown below:

$$\blacktriangleright \quad \overbrace{(42 \text{ ac. x } \$1{,}000{,}000)}^{\text{Cost of Facilities}} \div \overbrace{5{,}000 \text{ units}}^{\text{Anticipated New Units}} = \overbrace{\$8{,}400 \text{ per unit}}^{\text{Fee}}$$

While other funding sources would still need to be identified to fund the 12 acres of parks that are needed to address the community's existing deficiencies, using this methodology would capture the full amount of park costs attributable to new development.[5]

Methodologies that result in fees that do not fully account for the public facilities impacts of new development are legally permissible under the Mitigation Fee Act. The City may choose as a matter of policy not to charge new development the full cost of public facilities needs. However, consistency with the City's General Plan should also be considered, as discussed below in Section II.

[5] This methodology would result in 72 acres of parks, which is 15 acres more than the 57 acres gained through the historically applied methodology.

II. COMMUNITY PLANS AND PROJECT APPROVALS MUST BE CONSISTENT WITH THE GENERAL PLAN

A. The General Plan Must Be Internally Consistent

A city's general plan and all its elements must comprise "an integrated, internally consistent and compatible statement of policies . . . ." Cal. Gov't Code § 65300.5. This internal consistency requirement is applicable to charter cities. *Garat v. City of Riverside*, 2 Cal. App. 4th 259, 285-86 (1991), overruled on other grounds by *Morehart v. County of Santa Barbara*, 7 Cal. 4th 725 (1994). The internal consistency requirement has also been uniformly construed as promulgating a judicially reviewable requirement "that the elements of the general plan comprise an integrated internally consistent and compatible statement of policies." *Concerned Citizens of Calaveras County v. Board of Supervisors*, 166 Cal. App. 3d 90, 97 (1985) (citations omitted). However, a court will not find a general plan to be internally inconsistent unless a reasonable person could not conclude that the plan was internally consistent. *Federation of Hillside & Canyon Ass'ns v. City of Los Angeles*, 126 Cal. App. 4th 1180, 1195 (2004).

Community plans are a component of the Land Use Element of the General Plan, and carry the same legal force as the general plan. General Plan, Land Use and Community Planning Element, at LU-21; *see also* William Fulton & Paul Shigley, Guide to California Planning at 249 (4th ed. 2012). Therefore, a community plan must be internally consistent with the General Plan. While a Financing Plan is intended to implement the General Plan, it is not a part of the General Plan, and is therefore not subject to the internal consistency requirement. However, this Office cautions that to the extent that a community plan relies on a Financing Plan to implement its policies, and the Financing Plan accompanying the community plan for approval does not implement those policies, a potential inconsistency could exist.

General Plan Policy PF-A.3 calls for the "[m]aint[enance] [of] an effective facilities financing program to ensure the impact of new development is mitigated through appropriate fees identified in PFFPs" and for "[e]nsur[ing] new development pays its proportional fair-share of public facilities costs through applicable DIFs pursuant to the California Government Code." General Plan, Public Facilities, Services and Safety Element, at PF-9. As discussed above in Section I.B, where the historical methodology for calculating DIFs is applied, the resulting fee can amount to less than a project's true fair share of the costs of public facilities needed to serve new development. In such a case, the City Council must determine whether the community plan that relies on a financing plan to meet these polices is consistent and compatible with the General Plan.[6]

B. Future Land Use Decisions Must Be Consistent with the General Plan

In addition, the General Plan is the City's "'constitution' for all future development" and the City's land use decisions must be consistent with its expressed policies. *Lesher Commc'ns, Inc. v. City of Walnut Creek*, 52 Cal. 3d 531, 540 (1990); *Friends of Lagoon Valley v. City of Vacaville*, 154 Cal. App. 4th 807, 815 (2004). A project is consistent with the general plan "'if, considering all its aspects, it will further the objectives and policies of the general plan and not

[6] It has been asserted that the General Plan requires new development in FBA communities to pay for the entire cost of public facilities in the community. At most, the General Plan requires new development to pay for the public facilities it requires. It does not and cannot require new development to pay for more facilities than it requires.

obstruct their attainment.'" Governor's Office of Planning and Research, *State of California General Plan Guidelines* at 164 (October 2003) (citing 58 Op. Cal. Att'y. Gen. 21, 25 (1975)). An agency's finding that a project is consistent with the general plan "can be reversed only if it is based on evidence from which no reasonable person could have reached the same conclusion." *A Local & Reg'l Monitor v. City of Los Angeles*, 16 Cal. App. 4th 630, 648 (1993); *see also No Oil Inc. v. City of Los Angeles*, 196 Cal. App. 3d 223, 243 (1987). A project "need not be in perfect conformity with each and every [general plan] policy" since "no project [can] completely satisfy every policy stated in [a general plan]." *Sequoyah Hills Homeowners Ass'n v. City of Oakland*, 23 Cal. App. 4th 704, 719 (1993). However, "the nature of the policy and the nature of the inconsistency are critical factors to consider." *Families Unafraid to Uphold Rural El Dorado County v. Board of Supervisors*, 62 Cal. App. 4th 1332, 1341 (1998). Thus, a project will be held inconsistent with a general plan where it is clearly inconsistent with a fundamental, mandatory and specific policy of the general plan, or if it is not compatible with and will frustrate the general plan's goals and policies. 9 Miller & Starr, Cal. Real Est. § 25:40 (3d ed. 2007) (citing *Families Unafraid*, 62 Cal. App. 4th at 1340; *Napa Citizens for Honest Government v. Napa County Bd. of Supervisors*, 91 Cal. App. 4th 342, 378-80 (2001)). An inconsistency may exist where implementation of a project will frustrate a policy stated in a general plan and there is no affirmative commitment to mitigate that adverse effect. *See Napa Citizens*, 91 Cal. App. 4th at 380 (an agency cannot state a policy of reducing traffic congestion, recognize that an increase in traffic will cause unacceptable congestion and at the same time approve a project that will increase traffic congestion without taking affirmative steps to handle that increase).

General Plan Policy PF-C.1.d "[r]equire[s] development proposals to fully address impacts to public facilities and services" by "[p]rovid[ing] public facilities and services to assure that current levels of service are maintained or improved by new development within a reasonable time period." General Plan, Public Facilities, Services and Safety Element, at PF-15. Oftentimes, development relies on payment of their FBAs or DIFs to satisfy their public facilities impacts. To the extent that the FBA or DIF does not "fully address impacts to public facilities" caused by a development project, unless additional conditions are imposed upon a particular project on a case-by-case basis, a potential General Plan inconsistency could exist. Ultimately, for future discretionary projects, the decision maker will have to determine whether a future project furthers the objectives and policies of the General Plan or whether it obstructs their attainment. It must also ensure that the project does not clearly conflict with any fundamental, mandatory, and specific policies such that no reasonable person could conclude that the project is consistent with such policies.

CONCLUSION

There is no legal distinction between an FBA and a DIF, other than the additional procedural requirements set forth in the FBA Ordinance that are applicable to fees adopted in communities identified as FBA communities. However, the practical difference is in the methodologies City staff uses to calculate the amount of the fees. In both "FBA communities" and "DIF communities," the City must ensure that it does not use a methodology that results in a fee that is not reasonably related to the impacts of new development in the community. Specifically, the Council should make certain that Financing Plans in "FBA communities" do not result in fees that are greater than the burdens posed by new development. On the other hand, the Council should be aware of the potential for not capturing the full cost to provide public facilities to new development in "DIF communities." Additionally, potential general plan inconsistencies could exist when a community plan amendment is considered simultaneously with a Financing Plan where the community plan relies on the Financing Plan to implement public facilities policies. Furthermore, if a fee does not capture the full amount of the cost of public facilities attributable to new development, future projects may also be inconsistent with the General Plan unless additional fees are imposed on such projects on a case-by-case basis.

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RC-2013-14
Doc. No. 619673