IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

COURT OF APPEALS OF NEW MEXICO
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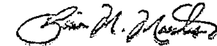

CITY OF RIO RANCHO,

Plaintiff-Appellant,

v. Ct. App. No. 29,510

CLOUDVIEW ESTATES, LLC,

Defendant-Appellee.

REPLY BRIEF

Appeal from the County of Sandoval
Chief Judge Louis P. MacDonald

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DISCUSSION

I. Cloudview's request for review of the City's Decision was untimely.

Defendant/Appellee Cloudview Estates, LLC ("Cloudview") failed to request review of the Decision made by the Governing Board of Plaintiff/Appellee City of Rio Rancho ("City") within the thirty-day time period provided by NMSA 1978, §39-3-1.1(C) (1999) and Rule 1-074(E) NMRA, thereby depriving the district court of jurisdiction. BIC 14-17.

Cloudview argues that the thirty-day window for appeal should not apply to Cloudview because it would not be fair. AB 43-44. Cloudview relies on the "doctrine of equitable tolling" discussed in *Estate of Gutierrez by Haney v. Albuquerque Police Dept.*, 104 N.M. 111, 717 P.2d 87 (Ct.App. 1986), *overruled by Bracken v. Yates Petroleum Corp.,* 107 N.M. 463, 760 P.2d 155 (1988). AB 43. In *Gutierrez*, the plaintiff unsuccessfully urged the court to adopt California's principle of equitable tolling. Cloudview cites no New Mexico case that has adopted the broad Californiadoctrine. *See Gathman-Matotan Architects and Planners, Inc. v. Dep't of Finance and Admin.,* 109 N.M. 492, 493-44, 787 P.2d 411, 412-13 (1990) (noting that the *Gutierrez* Court "discussed" the California principle of equitable tolling); *Gutierrez*, 104 N.M. at 116, 717 P.2d at 92 (discussing equitable tolling and citing to *Nichols v. Canoga Indus.*, 83 Cal. App. 3d 956, 148 Cal. Rptr. 459 (Ct. App. 1978)). *See generally Bracken*, 107 N.M. at

464-67, 760 P.2d at 156-59. Moreover, Cloudview has cited no case that applies this broad doctrine to review of an administrative decision.

Even if the equitable tolling doctrine espoused by Cloudview would apply, which the City vigorously disputes, Cloudview failed to bring suit within the time allowed. "When equitable tolling is applied, the limitations period is deemed interrupted; when the tolling condition or event has ended, the claimant is allowed the remainder of the limitations period in which to file the action." *Haekal v. Refco, Inc.*, 198 F.3d 37, 43 (2d Cir. 1999); *see also Gathman-Matotan*, 109 N.M. at 494-95 (recognizing that equitable tolling interrupts the running of the limitation period). Our Supreme Court followed this principle in *Bracken*. *See* 107 N.M. at 466, 760 P.2d at 158 (holding that the plaintiff had the remainder of the statute of limitations in which to file her complaint).

In the instant case, however, Cloudview had two days remaining in the thirty day period for requesting review of the City's Decision after the federal action was dismissed, yet did not request review until seventeen days later. BIC 16-17. Cloudview's request for review was therefore untimely.

Cloudview suggests that the district court's reasoning based on Federal Rule of Appellate Procedure 4(a)(1)(A) and the thirty-day time for appeal to the Tenth Circuit falls within the scope of New Mexico's application of the equitable tolling doctrine. AB 42; *see also* TR 04/09/07 at 28:5-10 (stating the court's feeling is

that Cloudview should have an additional thirty days "to decide whether or not they were going to proceed with their appeal in state court"). However, Cloudview cites no case law in support of this proposition. Moreover, the City has discovered no case holding that the end of the purported tolling event is when the time for filing an appeal has expired. *Cf. Nichols*, 83 Cal. App. 3d at 960 (noting that the state court action was filed while the federal appeal was pending).

Cloudview had a variety of options open to it to avoid the risk of failing to file its administrative appeal within thirty days, including the option of filing the appeal in state court as directed by §39-3-1.1(C). The mistake made by Cloudview as to the jurisdiction of the federal court does not create an equitable basis for tolling the statute.

II. Cloudview is collaterally estopped from challenging the City's finding that the parties intended the easement to be open space.

Cloudview asserts that the district court's ruling on the inverse condemnation claim rendered review of the City's Decision moot. AB 8-9. This assertion is exactly the reverse of the controlling law.

An agency's findings are binding and may be given preclusive effect, if such findings are supported by substantial evidence. *See Montano v. N.M. Real Estate Appraisal Bd.*, 2009-NMCA-009, ¶ 8, 145 N.M. 494, 200 P.3d 544; *Southworth v. Santa Fe Servs., Inc.*, 1998-NMCA-109, ¶ 12, 125 N.M. 489, 963 P.2d 566. Thus, the findings of an agency must be reviewed to determine whether they are

supported by substantial evidence before findings on the same issue may be considered by the district court. If an agency's finding is supported by substantial evidence, the complaining party cannot relitigate that fact.

In this case, the City made findings that are crucial to the claim for inverse condemnation. Here, the district court improperly made findings contrary to those of the City's, prior to its review of the City's Decision. BIC 17-19. The district court's rulings should be reversed on this basis alone.

Moreover, proper analysis and review of the City's findings supports the position that Cloudview's inverse condemnation claim is not viable, because Cloudview's request for review of the City's Decision was untimely. The City found that the parties intended the scope of the easement to be open space. BIC 7-8. Because this finding was not timely challenged for the reasons stated above, the City's Decision was a final determination regarding the scope of the easement, and Cloudview is therefore collaterally estopped from relitigating the issue.

A party is collaterally estopped when "(1) the parties in the current action were the same or in privity with the parties in the prior action, (2) the subject matter of the two actions is different, (3) the ultimate fact or issue was actually litigated, and (4) the issue was necessarily determined." *City of Sunland Park v. Macias*, 2003-NMCA-098, ¶ 10, 134 N.M. 216, 75 P.3d 816. In this case, (1) both Cloudview and the City were parties to the administrative proceeding, *see*

Administrative Record on Appeal ("ROA") 10; (2) the subject matter in the administrative proceeding was vacation of the easement, *id.* at 10, 193, while the subject matter of Cloudview's claim is a takings claim, AB 10-11; (3) the scope of the easement, as manifested by the intent of the parties, is an ultimate fact in the inverse condemnation case, *see, e.g.*, AB 10, and this fact was actually litigated in the administrative proceeding, *see, e.g.*, ROA 187, 190-91, 192, 194, 196, 199 at ¶ 4, 201 at ¶¶ 14 & 17; and (4) the determination regarding the scope of the easement was necessary to reach a decision on vacation of the easement. *See id.* at 193-94, 196, 201 at ¶ 17; *see also* BIC 20-21.

Because Cloudview failed to timely appeal the determinative issue, which was necessarily litigated in the administrative proceeding, Cloudview is collaterally estopped from relitigating the issue in its claim for inverse condemnation. Cloudview's claim for inverse condemnation therefore fails as a matter of law.

III. Cloudview is not a bona fide purchaser because the City's easement was properly recorded.

Cloudview's arguments rest on the premise that the recording statutes apply to the facts of this case. AB 12. However, a close reading demonstrates that the recording statutes are not applicable to the instant case.

NMSA 1978, Section 14-9-1 (1991) provides that all writings "affecting the title to real estate shall be recorded in the office of the county clerk." The Vista

Hills West Unit 1 ("VHWU1") final plat was recorded. The final plat clearly indicated that the City's easement burdened the entirety of Parcel F. Cloudview therefore had record notice that the City's interest precluded any economic use of Parcel F. NMSA 1978, §14-9-2 (1886-1887). Under these facts, Cloudview was not a bona fide purchaser protected by the recording statutes.

IV. The City's finding that the parties intended the scope of the easement to be open space is supported by substantial evidence and was made in accordance with law.

The City's finding regarding the scope of the easement is supported by substantial evidence and was made in accordance with law. BIC 19-22, 32-35. In New Mexico, the intended purpose of an easement must be construed according to the intent of the parties and the termination of an easement is dependent on the scope of its intended use. BIC 19-22. None of the cases cited by Cloudview overrules these well-established principles. *Compare* AB 13-14. The district court erred in determining otherwise.

In support of its arguments to the contrary, Cloudview incorporates by reference the arguments made by Amrep in the separate related appeal, *City of Rio Rancho v. Amrep Southwest, Inc.*, Ct. App. No. 28,709, and the arguments made below in response to the City's cross-motion for summary judgment. AB 15-16. Cloudview cites no authority for these incorporations. To the extent that the Court

should determine that such incorporations are allowed, the City likewise incorporates the arguments set forth in its pleadings related to the foregoing.

V. Cloudview was on inquiry notice and was therefore not a bona fide purchaser.

Cloudview was on inquiry notice that the City's interest would preclude any economic use of Parcel F. BIC 22-27. The issue is whether Cloudview had implied knowledge of the facts that a diligent inquiry would have uncovered, and the test is whether it exercised the ordinary care of a purchaser of property for development as a subdivision. *See O'Kane v. Walker*, 561 F.2d 207, 211 (10th Cir. 1977); 92A C.J.S. *Vendor and Purchaser* §491 (2009). A person with notice of conditions or restrictions is charged with the relevant facts that a further inquiry would have revealed, *such as the character and extent of the restrictions*. *Id.*

Cloudview mischaracterizes the City's argument regarding notice of the prohibition against residential development in an attempt to avoid addressing the facts pertinent to Cloudview's duty of inquiry. *See* AB 17-18. Notably, Cloudview does not deny that it knew Parcel F did not and could not serve a drainage purpose. *See* BIC 23. Further, Cloudview does not deny that its agent Martin Garcia was experienced in real estate development of subdivisions. *See* BIC 24. The fact that Parcel F was not and could not be used to control drainage was inconsistent with the record title use of Parcel F. Cloudview therefore had a duty to inquire. *See Clay Props., Inc. v. Wash. Post Co.*, 604 A.2d 890, 896 (D.C.

1992) ("The type of possession necessary to give rise to inquiry notice must be inconsistent with the record title, otherwise it will not be notice of the unrecorded interest.").

Cloudview argues that the duty to inquire arises only in "quite limited" factual circumstances. AB 18. Cloudview is wrong. *See, e.g.*, *id.* at 897 ("Contrary to the [plaintiff's] assertion, while possession of a person not the record owner is often a source of inquiry notice, it is not the sole possible source."). Any number of facts in other situations may trigger inquiry notice. *See id.* As discussed, Cloudview's experienced agent had knowledge putting Cloudview on inquiry notice that the scope of the City's interest in Parcel F precluded all economic development of Parcel F. *See* 92A C.J.S. *Vendor and Purchaser* §491 ("In determining what information is sufficient to place a purchaser on inquiry notice, the court will consider all the facts and circumstances, including the business experience of the purchaser and the availability of additional facts that could have been ascertained by a reasonable investigation." (citing *Miebach v. Colasurdo*, 685 P.2d 1074 (1984)); BIC 24-25. Like the purported bona fide purchaser in *Miebach*, Cloudview had knowledge of sufficient facts to put an experienced real estate investor on inquiry notice. *See* 685 P.2d at 1078-79.

Cloudview asserts that it had no duty to search out the Drainage Management Plan or the Preliminary Plat. AB 22. Cloudview's assertion is based

on the premise that it had no duty of inquiry. As established, however, Cloudview had knowledge of facts indicating the use of Parcel F was inconsistent with the use of record. *See* BIC 23-24. Thus, Cloudview had a duty to inquire, and a reasonably diligent inquiry would have included examination of the background documents.

Cloudview attempts to rationalize its purchase of Parcel F without performing due diligence by stating that it inquired with City staff, who "assured" Cloudview that vacation "could" occur as part of the platting project. AB 20-21. Such a cursory investigation into the status of a drainage easement over the entirety of a ten-acre parcel, *with the knowledge that the parcel could not serve that function*, was insufficient to satisfy the duty of inquiry of a party experienced in subdivision development. *Gallup Westside Dev't, LLC v. City of Gallup*, 2004-NMCA-010, ¶ 19, 135 N.M. 30, 84 P.3d 78 (ruling that the developers could not rely on statements made by city staff).

A diligent developer would have made further inquiries when his initial inquiry provided no answer. *See* RP 528 at 21:8-23; RP 529 at 25:10-13 ("[W]hen I asked the question of why the property had -- was blanketed with a drainage easement, everybody was kind of dumfounded just like I was. They didn't quite understand why."). A diligent developer presented with a parcel that could serve no drainage function, yet was designated as a drainage easement, would have

examined the Drainage Management Plan submitted and filed with the City as required by law. Cloudview was required to include the drainage management plan in its own drainage plan, RP 491, and thus a reasonably diligent inquiry would have included review of the same. A diligent developer would have reviewed the Preliminary Plat on file with the City. Examination of the preliminary plat could assist a prudent developer in resolving the inconsistency between Parcel F's use and its designated use of record.

In addition, a diligent developer would have reviewed the City's development code to determine the process necessary to vacate the easement. *See* RP 42-43; *cf.* RP 529 at 23:16-20. A diligent developer would have spoken with engineers or other developers with experience in working with the City of Rio Rancho on subdivision applications and permitting before committing to purchase of a property for this purpose. *Cf. id.* at 24:1-12; *see also id.* at 23:3. Indeed, a diligent developer would have conditioned purchase of Parcel F on vacation of the easement. *See* BIC 26. Because Cloudview was aware of the inconsistency of Parcel F's use (or non-use) and its designation as a drainage easement, yet did not inquire beyond a brief meeting with City staff unfamiliar with the property in question, Cloudview failed to make a reasonable inquiry. *See* BIC 23-27.

Cloudview mistakenly asserts the City cannot show that anyone, other than the City, was aware that "drainage easement" was used as a surrogate for "open

space." AB 23. However, in February of 1987, Amrep applied to the City to replat Parcel H of VHWU1 from "open space" to R-1 Single Family Lots, notwithstanding the VHWU1 final plat's designation of Parcel H as a "drainage easement." And in August of 1987, Amrep's representative expressly recognized the use of drainage areas for open space: "Drainage areas have been utilized for open or park space as a development norm on a national basis. I would suggest that we utilize these drainage areas on the same basis." RP 344 (Letter, James Wall, Amrep Vice President, to Mayor Grover Nash, City of of Rio Rancho (Aug. 19, 1987); *see* RP 331-32.

In sum, Cloudview failed to conduct a reasonable inquiry into the question Cloudview raised in the very first stages of development—why was a drainage easement imposed on a ten acre parcel that could serve no such purpose? *See* RP 529 at 25:6-13. "The time to inquire as to the value of the property being sold is prior to sale, not after the bargain is struck." *Twin Forks Ranch, Inc. v. Brooks*, 1998-NMCA-129, ¶ 21, 125 N.M. 674, 694 P.2d 838 (holding that the appellant could not expect the law to reform a contract based on what it would have done had it known the nature of the property when it entered into the contract). Because Cloudview failed to diligently pursue its inquiry, Cloudview is not a bona fide purchaser.

VI. Cloudview's reading of the City's ordinance renders it meaningless.

In submitting the VHWU1 preliminary plat for approval, Amrep was required to identify all developable land in the proposed subdivision. *See* BIC 5-8, 34-35, 39-40. The ordinance provides that "a preliminary plat *shall include* all land owned or controlled by the subdivider, *which is or may be suitable for or susceptible to* subdivision or development." ROA 32, 38 (emphasis added). Thus, Amrep was required to include *all* land that is or may become suitable for development in the future.

Cloudview argues that the ordinance does not require a developer to "identify" all developable land. AB 24-25. Cloudview's reading renders the ordinance meaningless. One purpose of subdivision regulation is planning. *See McGarry v. Scott*, 2003-NMSC-016, ¶ 8, 134 N.M. 32, 72 P.3d 608. Including all land that may become suitable for development, without identifying it as such, would not serve the planning purpose. Cloudview's position is therefore unavailing.

Notably, the preliminary plat and the final plat serve two different purposes. *See* NMSA 1978, §47-6-2 (2009) (defining "final plat" and "preliminary plat"). If information in the final plat raises a question in light of the facts, it is reasonable to conclude that the preliminary plat should be consulted to resolve the question. Cloudview offers no authority in support of its assertion that the final plat

"supercedes" the preliminary plat. *See* AB 22. This assertion therefore does not justify Cloudview's failure to diligently inquire.

VII. Cloudview was not deprived of a right that it possessed.

At the time of purchase, Cloudview did not acquire the right of which it was allegedly deprived. BIC 40-43. Cloudview asserts that it acquired the right to "economically beneficial or productive use" because it acquired a fee simple interest, notwithstanding the existing easement of record over the entirety of the property. AB 30. Cloudview ignores, however, the crucial distinction in the facts of the instant case—Cloudview never had the right to put Parcel F to economically beneficial use because, as Cloudview knew at the time of purchase, the easement precluded any such use. *See* ROA 190, 194.

Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027 (1992) expressly recognizes this distinction, stating that a property owner is not entitled to compensation when "the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Lucas* further explains, "we assuredly *would* permit the government to assert a permanent easement that was a pre-existing limitation upon the land owner's title." *Id.* at 1028-29; *see also id.* at 1030 (stating that recognizing compensation is not due when an owner is barred from putting land to a use that is proscribed by existing rules or understandings "is surely unexceptional").

Cloudview has cited to *no* case, and the City has discovered none, in which a court has held a taking occurred when the claimant never had the right to economic use of the property. *See, e.g.*, *Lucas*, 505 U.S. at 1006-07 (stating that petitioner acquired the lots two years before restrictions were enacted); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 532-33 (2005) (addressing legislation that limited plaintiffs' existing right to charge a lessee rent).

Cloudview's attempt to distinguish numerous cases cited by the City is meritless. The reasoning in the cases referenced in note 6, page 30, of the Answer Brief can be applied to the facts of this case. In each case, the court emphasized that the claimant did not have the right that was claimed. *See* BIC 42-43. Likewise, in the instant case, Cloudview never had the right that it allegedly claims—the right to develop Parcel F for beneficial use in any way inconsistent with the City's easement. In other words, Cloudview could not use its property for anything before the City's Decision, and Cloudview cannot use its property for anything after the City's Decision. *Cf.* AB 31. The City's Decision resulted in no change in the rights held by Cloudview, and thus no taking has occurred. *See City of Sugar Creek v. Reese*, 969 S.W.2d 888, 893 (Mo. Ct. App. 1998) (stating that no unconstitutional taking of private property occurred because no existing property right was affected). Cloudview cites no case holding that a taking occurred when the governmental action resulted in no change to the existing use. *See, e.g.*, *Steel v.*

Cape Corp., 677 A.2d 634, 635 (Md. Ct. App. 1996) (noting that the property was rezoned); *Morris County Land Improvement Co. v. T'ship of Parsippany-Troy Hills*, 193 A.2d 232, 545 (N.J. 1963) (noting that a new zoning classification was created for the area); *Twain Harte Assocs. Ltd. v. County of Tuolumne*, 217 Cal. App. 3d 71, 76, 265 Cal. Rptr. 737 (Ct. App. 1990) (noting that a rezoning had occurred); *Annicelli v. Town of S. Kingstown*, 463 A.2d 133, 135 (R.I. 1983) (noting that the zoning ordinance had been amended).

VIII. The City's Decision was proper.

The City's Decision was reasoned, supported by substantial evidence, and in accordance with law. BIC 30-36. Cloudview asserts that the City "originally approved . . . Cloudview's proposed subdivision 'on the merits,'" suggesting that this "approval" was thereafter "disapprove[d]." AB 37. Cloudview is wrong. The City never issued a final decision on the approval of Cloudview's preliminary plat. Rather, VHWU1 landowners appealed the decision of the Planning and Zoning Board ("PZB"). BIC 2. On appeal, the City remanded to the PZB for reconsideration in light of evidence that was not previously before the PZB. BIC 2-3. Cloudview consented to the remand. ROA 193. Because the City never reached a final decision on approval of the preliminary plat, Cloudview's reliance on the purported "disapproval" has no merit. *See* AB 37.

IX. Disputed questions of material fact preclude summary judgment.

As discussed, numerous questions of fact preclude summary judgment. *See* BIC 17-19. Cloudview asserts "that it is a trial court's job [to factfind] when presented with undisputed facts." AB 38. This unsupported assertion must fail for three reasons.

First, crucial facts were disputed, most notably (1) the scope of the easement, *see* BIC 19-22; (2) whether Cloudview had a duty to inquire, *see* BIC 22-24; (3) if so, whether that duty to inquire was satisifed, BIC 24-27; *see Clay Props.*, 604 A. 2d at 898-99; 58 Am. Jur. 2d *Notice* §15 (2008); and (4) whether Cloudview's investment-backed expectations were reasonable. BIC 43-45. Second, contrary to Cloudview's assertion, the court is not entitled to factfind when a jury is requested. BIC 17-19; *compare* AB 38-39. Third, the court is not entitled to factfind in its review of an administrative proceeding. BIC 9-10, 17-19.

Without citation to authority, Cloudview contends that "no one really knows what the Governing Body 'considered' when it made its decision" and that therefore the district court was entitled to consider evidence that was not before the City when it issued the decision from which Cloudview appealed. AB 38-39. Cloudview's reasoning would obliterate case precedent on the proper scope of administrative review. *See* BIC 9-10. If Cloudview wanted the documents in question to be considered by the City when it reached the decision at issue,

Cloudview should have introduced these documents into the record at the appropriate time. *See* Rule 1-074(H)(2). Because these documents were not considered by the City when it reached the decision on appeal, the documents in the supplemental administrative record were not properly before the district court. To the extent that the district court relied on the supplemental record proper in reaching its decision, any dependent ruling was erroneous and should be reversed.

In sum, the district court erred by engaging in factfinding under the circumstances of this case. On this basis alone, the court's rulings should be reversed and the case remanded for jury trial.

CONCLUSION

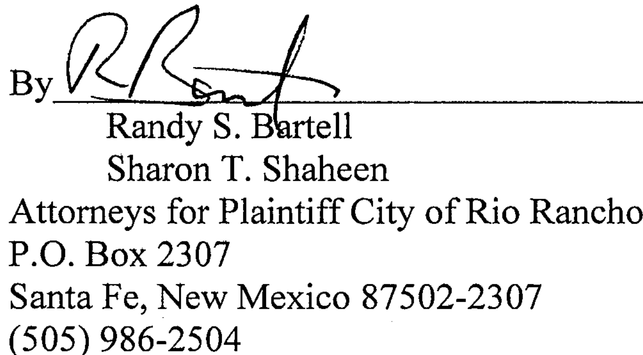
The City's Decision should be affirmed. The Decision was a reasoned and proper application of the law to the facts found by the City, and the City's findings were supported by substantial evidence. Moreover, because the City's Decision was proper, Cloudview's independent claims have no merit. The City therefore requests the Court to reverse the district court's rulings and to affirm the City's Decision accordingly. The City further requests that this Court declare that the nature and extent of the easement was and is, as found by the City, open space in perpetuity.

In the first alternative, the City requests the Court to remand for trial on disputed questions of fact. In the second alternative, if this Court affirms the

rulings of the district court, the City requests that this case be remanded to the City for reconsideration of Cloudview's application to vacate the easement. Cloudview fails to respond to this alternative form of relief requested by the City, merely assuming that it is entitled to damages based on a permanent taking. *See* BIC 47. As recognized by the United States Supreme Court, however, the City may revisit Cloudview's request for vacation of the easement and thereby avoid payment of compensation for a permanent taking. *Lucas*, 505 U.S. at 1030 n.17.

Respectfully submitted,

MONTGOMERY & ANDREWS, P.A.



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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing to be delivered by First Class Mail on this 25th day of January, 2010, to the following:

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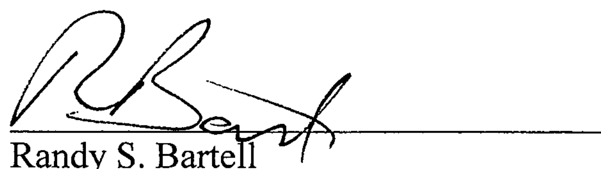

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