

NO. A09-1894

State of Minnesota
In Supreme Court

Richard Lepak,

Appellant,

v.

State of Minnesota, by its Commissioner of Transportation,

Respondent.

APPELLANT'S BRIEF AND ADDENDUM

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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I. STATEMENT OF ISSUES

1. **Whether the 2006 Amendments to Minnesota’s eminent domain laws changed the standard for determining whether a proposed taking is for a “public use” or “public purpose?”**

How the Issue was Raised in the Trial Court:

At the November 18, 2008, hearing on the Minnesota Department of Transportation’s (“MnDOT”) condemnation petition, Appellant Richard Lepak (“Lepak”) objected to the taking of his property to restore the private access to a neighboring parcel on the ground that the taking was not for a public use or public purpose. Lepak specifically addressed the effect of the 2006 Amendments in his July 28, 2009, brief in support of his proposed findings of fact and conclusions of law.

The Trial Court’s Ruling:

By order dated August 12, 2009, the district court adopted MnDOT’s proposed findings of fact and conclusions of law *verbatim*, without addressing the effect of the 2006 Amendments.

How the Issue was Preserved for Appeal:

Lepak timely appealed the district court’s August 12, 2009, Order.

Most Apposite Cases:

Port Authority of the City of St. Paul v. RLR, Inc., 758 N.W.2d 604 (Minn. Ct. App. 2008)

Most Apposite Statutory or Constitutional Provisions:

Minnesota Statutes, Section 117.012

Minnesota Statutes, Section 117.025

2. **Whether the State, consistent with the 2006 Amendments, may condemn private property for the purpose of constructing a private access to an adjoining parcel where the access will not be open for possession, occupation, ownership, and enjoyment by the general public?**

How the Issue was Raised in the Trial Court:

At the November 18, 2008, hearing on MnDOT's condemnation petition, Lepak objected to the taking of his property to restore the private access to a neighboring parcel on the ground that the taking was not for a public use or public purpose. Lepak specifically argued in his July 28, 2009, brief in support of his proposed findings of fact and conclusions of law that the state may not, consistent with the 2006 Amendments, take his property to restore his neighbor's access to Highway 61.

The Trial Court's Ruling:

By order dated August 12, 2009, the district court adopted MnDOT's proposed findings of fact and conclusions of law *verbatim*, without addressing the effect of the 2006 Amendments.

How the Issue was Preserved for Appeal:

Lepak timely appealed the district court's August 12, 2009, Order.

Most Apposite Cases:

Port Authority of the City of St. Paul v. RLR, Inc., 758 N.W.2d 604, 610 (Minn. Ct. App. 2008)

C and R Stacy, LLC v. County of Chisago, 742 N.W.2d 447, 457 (Minn. Ct. App. 2007)

Most Apposite Statutory or Constitutional Provisions:

Minnesota Statutes, Section 117.012

Minnesota Statutes, Section 117.025

Minnesota Statutes, Section 161.24

3. **Whether the State demonstrated adequately that the proposed taking of private property for the purpose of constructing a new private access to an adjoining parcel was necessary to accomplish a “public use” or “public purpose?”**

How the Issue was Raised in the Trial Court:

At the November 18, 2008, hearing on MnDOT’s condemnation petition, Lepak objected to the taking of his property to restore the private access to a neighboring parcel on the ground that the taking was not for a public use or public purpose. Because restoration of the private access is not a public use or public purpose, it *a fortiori* was not necessary to accomplish a public use or public purpose. Moreover, Lepak specifically argued in his July 28, 2009, brief in support of his proposed findings of fact and conclusions of law that the state had not demonstrated adequately that the taking of his property to restore his neighbor’s access to Highway 61 was necessary to accomplish a “public use” or “public purpose.”

The Trial Court’s Ruling:

By order dated August 12, 2009, the district court adopted MnDOT’s proposed findings of fact and conclusions of law *verbatim* concluding that the taking of Lepak’s property was necessary to accomplish the larger public purpose of reconstructing Highway 61.

How the Issue was Preserved for Appeal:

Lepak timely appealed the district court’s August 12, 2009, Order.

Most Apposite Cases:

Lundell v. Cooperative Power Association, 707 N.W.2d 376 (Minn. 2006)

Most Apposite Statutory or Constitutional Provisions:

Minnesota Statutes, Section 117.012

Minnesota Statutes, Section 117.075

II. STATEMENT OF THE CASE

This matter arises from the Minnesota Department of Transportation's ("MnDOT") petition for the condemnation of certain lands in connection with its proposed reconstruction of a 3.5 mile section of Trunk Highway 61. Appellant Richard Lepak ("Lepak") appeared, through counsel, at the November 18, 2008, hearing on MnDOT's petition and objected to the proposed taking of a portion of his property on the ground that the land was not being taken for a public use or public purpose. The district court granted MnDOT's petition by an order dated November 25, 2008.

Lepak appealed the district court's order. On March 3, 2009, the Court of Appeals dismissed Lepak's appeal without prejudice and remanded the matter to the district court "for findings and an order ruling on appellant's objection to the taking." On remand, both MnDOT and Lepak submitted proposed findings of fact and conclusions of law and supporting memoranda to the district court. In his memorandum, Lepak objected to the taking of a portion of his property on the ground that it was not a taking for a public use or public purpose and because it was not necessary to accomplish a proper purpose. By order dated August 12, 2009, the district court once again rejected Lepak's objection to MnDOT's petition.

Lepak renewed his appeal. On July 20, 2010, a divided panel of the Court of Appeals affirmed the district court's August 12, 2009, Order. On September 29, 2010, this Court granted Lepak's petition for further review of the August 12, 2009, Order and this appeal follows.

III. STATEMENT OF FACTS

MnDOT has proposed the reconstruction of a 3.5 mile section of Trunk Highway 61 to add wider shoulders, passing lanes, turn lanes, and a bike path, upgrade a wayside rest, and construct new bridges. Add. 2; App. 39-40.¹ The proposed project will impact twenty-three parcels along Trunk Highway 61 including the parcel owned by Lepak. App. 40.

On August 29, 2008, the State of Minnesota petitioned the Cook County District Court for an order transferring title and possession of portions of the affected parcels to MnDOT pursuant to Minnesota Statutes § 117.042. App. 1-30. The district court held a hearing on the petition at the Cook County Courthouse on November 18, 2008. *See generally* Transcript of November 18, 2008, Hearing on Petition for Condemnation, App. 31-90. Lepak appeared at the November 18, 2008, hearing through counsel and objected to MnDOT's Petition on the ground that a portion of the proposed taking of his property is not for a public use or public purpose and, therefore, is prohibited by Minnesota law. Add. 1; App. 33, 42, 73-76.

¹ The abbreviation "Add." refers to the Relator's Addendum submitted pursuant to Minn. R. Civ. App. P. 128.02, subd. 3. The abbreviation "App." refers to the Relator's Appendix submitted pursuant to Minn. R. Civ. App. P. 130.01.

Lepak's property, referred to as Parcel 15 in MnDOT's Petition, is an unimproved parcel of land north of and adjacent to Minnesota Trunk Highway 61 in Cook County, Minnesota. App. 140. MnDOT seeks to acquire a 110 foot wide strip of land across Lepak's property running parallel to Trunk Highway 61. App. 55. Approximately 75 feet of this land would be used for the purpose of reconstructing Trunk Highway 61. App. 73, 140. The additional 35-foot wide section of land, which is the subject of Lepak's objection, would be used to construct a new private access across Lepak's property to reconnect a neighboring parcel to Trunk Highway 61. App. 73, 140.

Prior to the reconstruction, Lepak's neighbor to the west, referred to as Parcel 14 in MnDOT's Petition, had access to Trunk Highway 61 through a private access. App. 116, 140. This private access is contained within the boundaries of Parcel 14 and does not cross into or over any neighboring parcels of land. App. 140. The proposed highway reconstruction would eliminate Parcel 14's current access to Highway 61. App. 116. MnDOT proposes to use Lepak's property to restore the private access for Parcel 14. App. 116

The new private access begins where Lepak's property and the property of his neighbor to the east (referred to as Parcel 16 in MnDOT's Petition) meet Highway 61. App. 60-61, 140. The access then crosses the entirety of Lepak's property before reaching Parcel 14 to the west. App. 60-61, 140. According to the plans developed by MnDOT, the private access extends from the boundary of Lepak's property to the existing garage of the private residence on Parcel 14. App. 140. MnDOT is not condemning any portion of Parcel 14 in connection with the reconstruction of its private

access. App. 140. Similarly, the small portion of the new private access constructed on Parcel 16 (to the east) would be located entirely within the 75 foot strip of land which the State has taken for purposes of reconstructing Trunk Highway 61. App. 140. According to MnDOT, Lepak and his neighbors would be jointly responsible for the maintenance of the proposed private access. App. 74-75.

Lepak did not challenge the condemnation petition as it relates to the 75-foot wide section of property necessary for the reconstruction of Trunk Highway 61. App. 132. However, Lepak did object to the condemnation of the 35 feet of land to be used to restore Parcel 14's access to Highway 61 on the ground that it is not for a public use or public purpose and is not necessary to accomplish a proper purpose. App. 73-76; 136.

IV. ARGUMENT

A. STANDARD OF REVIEW.

Whether a proposed taking is for a public use or public purpose is a question of fact and the district court's determination is reviewed under the clearly erroneous standard of review. *Housing and Redevelopment Authority in and for the City of Richfield v. Walser Auto Sales, Inc.*, 630 N.W.2d 662, 666 (Minn. Ct. App. 2001) (aff'd 641 N.W.2d 885). A decision is clearly erroneous and may be overturned if the reviewing court is left with "the definite and firm conviction that a mistake has been made." *Prahl v. Prahl*, 627 N.W.2d 698, 702 (Minn. Ct. App. 2001). Questions of law, including the proper interpretation of statutes, however, are reviewed *de novo*. See, *In re Condemnation by City of Minneapolis of Certain Lands in City of Minneapolis*, 632 N.W.2d 586, 589 (Minn. 2001).

B. RESTORING PARCEL 14'S PRIVATE ACCESS TO HIGHWAY 61 IS NOT A PUBLIC USE OR PUBLIC PURPOSE.

A property owner has a right of access to a public road abutting his property. *C and R Stacy, LLC v. County of Chisago*, 742 N.W.2d 447, 457 (Minn. Ct. App. 2007) (citing *Finke v. State of Minnesota*, 521 N.W.2d 371, 375 (Minn. Ct. App. 1994)). MnDOT's reconstruction project will eliminate Parcel 14's existing access to the Highway 61. Therefore, under Minnesota law, the State must either compensate the owner of Parcel 14 for the lost access or provide an alternative access point to the highway. *Id.* at 457 (If the State cuts off the property owner's "reasonably convenient and suitable access," it must provide adequate compensation for the lost access) (citing *Johnson v. City of Plymouth*, 263 N.W.2d 603, 605 (Minn. 1978)). Here, rather than compensating the owner of Parcel 14 for the lost access, the State has condemned Lepak's property to restore the private access. This taking of private property to solve a private problem caused by the highway reconstruction project is not a permissible exercise of the state's power of eminent domain.

Under Minnesota law, the power of eminent domain "may only be used for a public use or public purpose." Minn. Stat. § 117.012, subd. 2. The terms "public use" and "public purpose" are defined narrowly and exclusively as:

- (1) the possession, occupation, ownership, and enjoyment of the land by the general public or by public agencies;
- (2) the creation and function of a public service corporation; or

- (3) mitigation of a blighted area, remediation of an environmentally contaminated area, reduction of abandoned property, or removal of a public nuisance.

Minn. Stat. § 117.025, subd. 11(a). The condemnation of Lepak's property to restore the access to parcel 14 is not a taking for a "public use" or "public purpose" and, therefore, is not authorized under Minnesota law. *See Port Authority of the City of St. Paul v. RLR, Inc.*, 758 N.W.2d 604, 610 (Minn. Ct. App. 2008) (holding that Port Authority was not authorized to enter property to conduct environmental testing where it had not identified a "public use" or "public purpose" for which the property could be acquired in eminent domain proceedings in light of the 2006 Amendments).

The private nature of the taking is self-evident: the new access runs directly from Highway 61 to the existing garage of the private residence on Parcel 14;² the primary rationale for constructing the access is to replace Parcel 14's existing driveway;³ and the access will serve, at most, three private parties.⁴ Neither the general public nor MnDOT will possess, occupy, own, *and* enjoy the new access as is required to establish a "public use" or "public purpose" necessary to exercise the power of eminent domain.

The conclusion that the new access is not "public" is further supported by the fact that MnDOT intends to require Lepak and his neighbors to pay the costs of maintaining

² App. 140.

³ App. 77 ("We can't leave them landlocked. They've got to have access."); App. 116 ("The access is absolutely necessary for Parcel 14, because that parcel's sole access in the pre-condemnation situation is by a driveway directly onto TH 61 that will be eliminated in connection with the Project. Absent a new access road, Parcel 14 would be landlocked.").

⁴ App. 57

the access.⁵ App. 74-75. Roads constructed to serve the public by connecting other public roadways are maintained by the public. Minnesota Statutes § 161.24, subd. 5 (“Any roads so constructed outside the limits of the trunk highway shall be maintained by the road authority having jurisdiction over the highway or street closed off.”). However, when the state builds a road intended to serve private parties by restoring their private access, the obligation to maintain the access falls upon the private parties served by the new private road. *Id.* (“Any private road constructed outside the limits of the trunk highway connecting the private road with a public highway shall be the responsibility of the property owner or owners served thereby.”). The state’s intent to require Lepak and his neighbors to bear the costs of maintaining the new access further supports the inescapable conclusion that it is a private, not public, road.

MnDOT argues that it is entitled to take Lepak’s land to restore the private access to Parcel 14 in light of the authority conferred upon it by Minnesota Statutes, Section 161.24, subdivision 4. *State of Minnesota v. Lepak*, 2010 WL 2813456 at *6; *see also*, Resp. Brf. to Ct. of Appeals at 17 (“Critically, [Minn. Stat.] § 161.24 provides authority for MnDOT to acquire via condemnation property from Lepak even if doing so would serve only Parcel 14, Lepak’s neighbor.”). The statute provides, in pertinent part, that the

⁵ As noted in the dissenting opinion by Judge Ross the representation to the district court by Lepak’s counsel that MnDOT’s counsel, who also was present at the district court hearing, had expressly informed his office that Lepak and his neighbors would have to share the costs of maintaining the access was undisputed and sufficiently preserved for consideration by the appellate courts. *State of Minnesota, by its Commissioner of Transportation v. Lepak*, No. A09-1894, 2010 WL 2813456 at *5 (Minn. Ct. App. July 20, 2010) (A copy of this decision is included in the Appendix at App. 142-46).

State “may, in mitigation of damages or in the interest of public safety and convenient public travel, construct a road . . . connecting [a highway, street, private road, or entrance closed off by the reconstruction of a trunk highway] with another public highway” and may acquire all necessary lands “by purchase, gift, or condemnation.” Minn. Stat. § 161.24, subd. 4. This statutory authority is consistent with the line of eminent domain jurisprudence holding that the terms “public use” and “public purpose” were to be broadly construed. *See e.g., City of Duluth v. State of Minnesota*, 390 N.W.2d 757, 763 (Minn. 1986) (“[T]his court has construed the words ‘public use’ broadly. Historically, the court has used the words ‘public use’ interchangeably with the words ‘public purpose’”); *Dairyland Power Co-op. v. Brennan*, 248 Minn. 556, 82 N.W.2d 56 (1956).

In 2006, however, the Minnesota Legislature passed a series of amendments to Minnesota’s eminent domain statutes designed to protect and strengthen the rights of private property owners.⁶ The Legislature commanded that the power of eminent domain may be used only for a public use or public purpose and, by narrowly defining the terms, repudiated the broad interpretation of “public use” and “public purpose” which had come to dominate the law of eminent domain. Minn. Stat. §§ 117.012, subd. 2; 117.025, subd. 11; *see also* 2006 Minn. Laws, Ch. 214 §§ 1-2.

⁶ *See* Office of State Senator Gary Kubly, Senate Passes Eminent Domain Compromise (May 16, 2008), at http://www.senate.state.leg.mn.us/members/member_pr_display.php?id=352&ls=84.

The 2006 Amendments, including the limited definition of public use and public purpose, preempt all inconsistent statutory provisions subject to limited exceptions which are not relevant here. Minn. Stat. § 117.012, subd. 1 (“Notwithstanding any other provision of law . . . all condemning authorities . . . must exercise the power of eminent domain in accordance with the provisions of this chapter including all procedures, definitions, remedies, and limitations.”); 2006 Minn. Laws, Ch. 214, § 22. Accordingly, the authority to take private property to mitigate damages to another parcel pursuant to Minnesota Statutes Section 161.24, subdivision 4 survives only to the extent that it is consistent with the 2006 Amendments.

A “private road” is, by its nature, private – not public. Neither the general public nor public agencies possess, occupy, own, *and* enjoy a private road. As a result, the condemnation of private property to mitigate damages to the properties served by a private road which is cut off by the reconstruction of a trunk highway is no longer authorized because it is not a taking for a “public use” or “public purpose.” Accordingly, Minnesota Statute, Section 161.24 is preempted by the 2006 Amendments to Minnesota’s eminent domain laws to the extent it purports to authorize such a taking.

The proposed taking of the additional 35 feet of Lepak’s property is not a taking for a “public use” or “public purpose” as those terms are defined in Minnesota Statutes, Section 117.025, subdivision 11, and the August 12, 2009, Order granting MnDOT’s petition for condemnation must be reversed as it relates to this portion of Lepak’s property.

C. THE CONDEMNATION OF LEPAK'S LAND IS NOT REASONABLY NECESSARY TO ACCOMPLISH A PROPER PUBLIC PURPOSE.

As explained above, the power of eminent domain may be used only to further a public use or public purpose. Minn. Stat. § 117.012, subd. 2. Before taking private property, however, the condemning authority also must satisfy its burden of demonstrating that the proposed taking is necessary to accomplish a public use or public purpose. Minn. Stat. §117.075 (providing that the district court shall appoint commissioners to determine the compensation due to the property owners “if the proposed taking shall appear to be necessary and such as is authorized by law”); *See also; City of New Ulm v. Schultz*, 356 N.W.2d 846, 848 (Minn. Ct. App. 1984). While it is not necessary to show that the taking is absolutely necessary, the condemning authority must demonstrate that the taking is “reasonably necessary or convenient for the furtherance of a proper purpose.” *City of Granite Falls v. Soo Line Railroad Company*, 742 N.W.2d 690, 699 (Minn. Ct. App. 2007) (*citing, City of Pipestone v. Halbersma*, 294 N.W.2d 271, 274 (Minn. 1980)).

In this case, MnDOT attempts to justify its proposed taking of Lepak's land to restore the private access to his neighbor's property by asserting it is reasonably necessary to accomplish the widening of Highway 61. App. 58. The problem, of course, is that the 35-foot wide strip of land is not being taken to further the reconstruction of the highway. Rather, the land is being taken to restore a private access to the highway. App. 116 (“The purpose of the taking from Parcel 15 is to construct a new access road to TH 61.”). The distinction is significant.

As explained above, restoring a private access to a public highway is not a “public use” or “public purpose.” Accordingly, the condemnation of land to restore a private access *a fortiori* is not reasonably necessary to further “a proper purpose.” In its brief to the Court of Appeals, MnDOT attempts to link the restoration of a private access with the reconstruction of Highway 61 by relying on this Court’s decisions addressing the deference owed to a condemning authority’s determination of necessity. *See*, Resp. Brf. to Ct. of Appeals at 9 (*citing, Lundell v. Cooperative Power Association*, 707 N.W.2d 376, 380-81 (Minn. 2006)). MnDOT’s reliance on *Lundell* and related decisions is misplaced.

In *Lundell*, Cooperative Power Association (“CPA”) had leased 4.5 acres of land from the Lundells to house a telecommunications tower to manage electric power transmission and distribution systems. *Lundell*, 707 N.W.2d at 379. After the parties were unable to renegotiate the terms of the lease, CPA exercised the power of eminent domain to condemn the property. *Id.* at 380. The Lundells challenged the taking, in part, on the ground that it was not necessary because CPA had the use and possession of the land under the terms of the existing lease and, therefore, needed to show that it is necessary to take fee title to the land rather than to continue to use the land under the lease. *Id.* at 381.

This Court rejected the Lundells’ argument noting that the condemning authority, from the start, has the option to either condemn property or to negotiate some lesser interest in the property and need not choose one alternative over the other. *Id.* at 382. In light of the deference afforded to the condemning authority, the mere fact that CPA could

have continued to use the land to house the telecommunications tower under the existing lease was insufficient to invalidate CPA's finding of necessity for the taking. *Id.*

Unlike the property owners in *Lundell*, Lepak is not challenging the scope of the proposed taking (i.e., whether the public purpose could have been achieved by taking a lesser interest in the land). *See also, City of Willmar v. Kvam*, 769 N.W.2d 775, 779 (Minn. Ct. App. 2009) (rejecting challenge to the district court's conclusion that the city showed the necessity of acquiring land in fee simple rather than an easement). Nor is Lepak challenging a particular alignment for a proposed highway project or the necessity of a taking for a highway project to increase safety, improve drainage of roadside ditches, or satisfy long-term increases in traffic flow. *See City of New Prague v. Hendricks*, 286 N.W.2d 696, 701-702 (Minn. 1979) (rejecting challenge that it was necessary to construct highway along proposed route); *County of Stearns v. Voller*, 584 N.W.2d 800, 803-04 (Minn. Ct. App. 1998) (rejecting challenge to condemnation for highway reconstruction on the ground that the taking was not necessary to serve a public purpose by improving safety and drainage and accommodating future traffic flows). Rather, Lepak is challenging MnDOT's attempt to justify the condemnation of his property to provide the private benefit of restoring his neighbor's private access to Highway 61 with the public purpose of reconstructing the highway. The two projects, reconstructing the highway and restoring a private access, are not one in the same.

If MnDOT did not restore the access to Parcel 14, by building a new private access across Lepak's property or otherwise, it would be obligated to compensate the owner of Parcel 14 for the loss of reasonable access to the highway. *C and R Stacy, LLC*, 742

N.W.2d at 457 (*citing, Johnson v. City of Plymouth*, 263 N.W.2d 603, 605 (Minn. 1978)). Rather than paying the required compensation to the owner of parcel 14, MnDOT has elected to satisfy its obligation to the owner of Parcel 14 by condemning Lepak's property and restoring the private access. This is not a taking to further the reconstruction of Highway 61; it is a taking to resolve a purely private problem – the elimination of a private access – created by the reconstruction of the highway. MnDOT acknowledged as much in its brief in support of its proposed findings of fact and conclusions of law. App. 116 (“The purpose of the taking is to construct a new access road to TH 61.”).

Moreover, the broad deference to the condemning authority's “legislative determinations” which supported this Court's decision in *Lundell* was sharply curtailed by the 2006 Amendments. Prior to 2006, the terms “public use” and “public purpose” were construed broadly and the legislature delegated, to the condemning authority, the power to determine whether a taking was reasonably necessary to accomplish a proper purpose. The 2006 Amendments constricted the scope of this delegation by narrowing the definition of “public use” and “public purpose.” Following the 2006 Amendments, any determination by a condemning authority which is inconsistent with the narrowed definition is manifestly unreasonable and not entitled to deference. *County of Stearns*, 584 N.W.2d at 802 (An authority vested with a legislative determination acts in a manifestly arbitrary or unreasonable manner when its actions “are taken capriciously, irrationally, and without basis under law or under circumstances which do not authorize or permit the exercise of the asserted power.”) (*quoting, Housing and Redevelopment*

Authority v. Minneapolis Metropolitan Co., 259 Minn. 1, 15, 104 N.W.2d 864, 874 (Minn. 1960)). MnDOT's determination that the condemnation of Lepak's land was reasonably necessary to accomplish a proper purpose is not entitled to deference because the restoration of private access is not a "public use" or "public purpose" as defined by the 2006 Amendments. Because the restoration of a private access is not a proper public purpose, MnDOT cannot demonstrate that the condemnation of Lepak's land was reasonably necessary to accomplish a proper purpose and the district court's order granting MnDOT's petition must be reversed.

V. **CONCLUSION**

For all of the foregoing reasons, Appellant Richard Lepak respectfully requests that the Supreme Court issue an order reversing the district court's August 12, 2009, Order granting the State's condemnation petition as it relates to the portion of Lepak's property which is proposed to be taken for the purpose of constructing a private access to Parcel 14.

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