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In the Zone

Presented by the Zoning and Land Use Practice Group

April 2010

Filing Requirement for 2010 Tax Appeals

By Jeffrey M. Hall

N.J.S.A. 54:3-21 is the jurisdictional statute for tax appeals. It was recently amended by L. 2009, c.251, effective January 16, 2010. This amendment is noteworthy as it raises the floor for filing direct real property assessment challenges in the Tax Court. Previously, a complaint could not be filed in the Tax Court and the County Board of Taxation bypassed if the assessed value exceeded $750,000. As of January 16, 2010, the assessed value for a property **must exceed** $1 million to trigger the court's original jurisdiction. R. 8:3-5 of New Jersey's Rules of Court were changed as of February 9, 2010, to conform.

Taxpayers are not without remedy if the property's assessment is $1 million or less. In that case, a **petition**, not a complaint, can be **filed** with the **County Board of Taxation** of the county in which the property is located. The procedural requirements for county boards differ from board to board as well as with the procedural requirements of the Tax Court. However, in either forum, a taxpayer must comply with several challenges including: (1) the burden of proof on value, (2) Chapter 91 and (3) Chapter 123. Failure to comply with any of these will result in dismissal of the taxpayer's petition or complaint, as the case may be.

The specifics of N.J.S.A. 54:3-21 (Statute) remain the same:

- A petition or a complaint must be filed on or before April 1 of the year of assessment or on or before May 1 if the taxing district undertook a municipal-wide revaluation or a municipal-wide reassessment.
- The taxing district (the assessor) is required to bulk mail to each property owner a notification of the assessment and file a certification with the County Board of Taxation advising of the date the bulk mailing was completed.
- Appeals are governed by the State Uniform Tax Procedure Law. An appeal to the Tax Court establishes jurisdiction over the entire matter with the court.
- A cross-petition of appeal or a counterclaim can be filed within 20 days from the date of service of a petition or a complaint by the other party.

It is well established that this Statute is jurisdictional and therefore filing deadlines cannot be waived. An untimely filing will result in a dismissal of an appeal no matter how meritorious. Finally, the appeal process established by this Statute does not apply to appeals of an assessment or an exemption based on a financial agreement controlled by the Long Term Tax Exemption Law.

For more information, please contact Jeffrey M. Hall at 609.895.6755 or jhall@foxrothschild.com.

Don't Miss the Atlantic Builders Convention!

April 14-16, 2010 | Atlantic City Convention Center | Atlantic City, NJ

The #1 builders show in the Northeast is coming up. For more information on the convention or to receive a complementary pass, please contact your Fox Rothschild attorney. Stop by the convention floor and visit us at booth 1235.

Treatment of Construction Industry by Health Care Reform Bill

By Robert W. Gundlach, Jr.

On March 23rd, President Obama signed into law the Health Care Reform Bill extending health insurance coverage to nearly 95% of all Americans. In part, the new law requires employers with 50 or more employees to offer health insurance.

Special provisions were added for the construction industry. In December 2009, Sen. Jeff Merkley (D-Oregon) successfully added an amendment to the original bill which requires construction companies with five or more employees, and at least $250,000 in annual payroll expenses, to provide health benefits to their workers or else pay a penalty of $750 per employee. Currently, this provision is now law and is slated to take effect on January 1, 2014.

However, the United States House of Representatives and the Senate are currently debating an additional piece of legislation designed to "fix" certain aspects of the freshly enacted law. These changes will likely be passed in the Senate via the often talked about "reconciliation process".

The good news is that this new bill seeks to strip out the harsher treatment of the construction industry and put home builders and remodelers on par with other small businesses. However, the "reconciliation" bill also seeks to increase the fine from $750 per employee to $2,000 per employee.

For more information, please contact Robert W. Gundlach, Jr. at 215.918.3636 or rgundlach@foxrothschild.com.

New Jersey Case of the Month

In The Matter of Riverview Development, LLC Waterfront Development Permit No. 0908-05-0004.3WFD060001.(Superior Court of New Jersey, Appellate Division, January 27, 2010)

By Jack Plackter

In the *Riverview Development* case, the Appellate Division was asked to consider whether townhouse residents, whose views of the Hudson River and New York City skyline would be fully or partially blocked by a proposed high-rise development, have the right to a trial-type hearing before the Office of Administrative Law (OAL). The residents wanted to contest the high-rise developer's application to the Department of Environmental Protection (DEP) for a waterfront development permit under the Coastal Zone Management Regulations.

The DEP commissioner denied the residents' demand for an OAL hearing, concluding the residents lacked a particularized property interest sufficient to require a hearing on constitutional or statutory grounds.

Through the residents' homeowners association, an appeal was filed of the commissioner's denial of the residents' request for an OAL hearing. The Appellate Division, for reasons stated in the opinion, affirmed the commissioner's denial of the residents' request. The residents lacked "a particularized property interest sufficient to require a hearing on constitutional or statutory grounds."

The developer in this instance, Riverview Development, LLC (Riverview), obtained a Waterfront Development Permit to construct 17 townhomes along a 1,150 feet riverside walkway, a two-floor parking structure and three high-rise towers. The towers would rise to a maximum height of 95 feet and would consist of 265 residential condominium units.

A neighboring property known as Bergen Ridge Townhomes was present at all stages of the permit process and in fact participated in a public hearing. Bergen Ridge consisted of 34 townhomes, approximately 30 feet high. Bergen Ridge was opposed to grant of the waterfront development permit on the grounds that Riverview's proposal would violate the high-rise structure regulations and traffic regulations contained in the Rules on Coastal Development.

Bergen Ridge appeared at a public hearing held on June 27, 2006, and had the opportunity to present both a viewshed analysis and traffic information. Moreover, Bergen Ridge also submitted post-hearing submissions regarding the proposed impact upon traffic and the viewshed.

After considering all of the evidence, the DEP approved and issued a Waterfront Development Permit to Riverview on October 23, 2006. Thereafter, on a timely basis, Bergen Ridge appealed the Waterfront Development Permit approval to the commissioner. The appeal requested a full adjudicatory hearing on the matter before the OAL. The commissioner issued a written decision denying Bergen Ridge's hearing request. Upon the denial, Bergen Ridge appealed the denial of its hearing request to the Appellate Division.

The court held that the third-party's right to a formal administrative hearing to contest the issuance of a permit is defined and circumscribed by the Administrative Procedure Act. The Administrative Procedure Act limits the situations in which third parties are entitled to a formal hearing to challenge a permit application.

The relevant portion of the Administrative Procedure Act provides that:

> Except as otherwise required by Federal Law or by statute that specifically allows a third party to appeal a permit decision, the State agency shall not promulgate any rule or regulation that would allow a third party to appeal the permit decision.

The court held that by enacting these limitations, the legislature unmistakably intended to prevent the processing of permit applications by state agencies from being bogged down by time-consuming and costly formal hearings in the OAL.

In addition, allowing such hearings would convert an agency's administrative review process into a "veritable litigation battleground."

On the other hand, the Appellate Division held that the legislature recognized the importance of respecting constitutionally or statutorily protected property rights of third parties that can be infringed upon by the issuance of a permit. Consequently, the APA does not foreclose such third parties from seeking judicial review of the merits of a permit once it is issued by an agency. The legislature has maintained significant avenues for third-party objectors to present their concerns about proposed permits to agency decision-makers before they reach a final determination on a permit application.

The Appellate Division held that the reported cases evaluating a third party's claimed right to a formal agency hearing had turned upon the relative strength of the property's interest that the third parties invoked. The more general and attenuated that property interest is, the less likely it will be sufficient to trigger a hearing under the statute. Fundamentally, the party affected by the administrative action must have a safeguarded interest. The Appellate Division then cited the line of cases denying property owners the right to appeal an agency decision to the OAL.

For example, in the *Normandy Beach Improvement Association v. Commissioner*, 193 N.J. Super. 57 (App. Div. 1983), a group of property owners opposed the DEP's issuance of a CAFRA permit to a county utilities authority that had sought to build a sewage pumping station near residents'

homes. The objecting homeowners in that case alleged that the quality of their lives would be adversely affected by the proposed pumping station. In order to buttress their contentions, the objectors retained a real estate expert who opined that the station would have a detrimental effect on the economic values of the homes in the area. The Appellate Division in that case rejected the homeowners' claims that their interest rose to such a level as to require the DEP to conduct a formal administrative hearing and consider their opposition. The court held that the DEP public hearing in the matter afforded the objectors an adequate opportunity to satisfy due process and fundamental fairness considerations, as well as the procedural requirements under the CAFRA Statute, and denied the property owners the right to an OAL hearing.

In the instant case, like *Normandy*, the Appellate Division concluded that the anticipated loss of scenic views and alleged negative traffic impacts did not rise to a "particularized property interest justifying the hearing." The Appellate Division found that because it is well settled as a matter of law, in the absence of a restrictive covenant a property owner has no right to an unobstructed view across a neighbor's property, the Bergen Ridge owners lacked such an interest.

Accordingly, this case reaffirms the extremely restricted right of objectors to compel an OAL hearing in the instance of a state-issued land use or environmental permit.

For more information, please contact Jack Plackter at 609.572.2200 or jplackter@foxrothschild.com.

Fox Rothschild Publishes Guide to the NJ Permit Extension Act

In New Jersey, it is costly and time-consuming to obtain permits and approvals for commercial and residential projects. The New Jersey Permit Extension Act extends the approval period of certain permits issued by state, county and local government units. The Act is intended to prevent the wholesale abandonment of approved projects and activities due to the present unfavorable economic climate -- which has particularly impacted real estate developers and redevelopers -- by tolling the running of the term of these approvals for a period of time, thereby preventing a waste of public and private resources.

Jack Plackter has prepared Preserving Permits and Approvals in New Jersey's Real Estate Industry: A Guide to the Permit Extension Act (P.L. 2009 c336) as a resource for developers and redevelopers looking to understand the nuances of the Permit Extension Act. To view the guide, click here.

Recent Approvals

By John L. Grossman

The firm recently secured the following approvals:

- **Pleasantville, NJ Zoning Board of Adjustment** Obtained second amended preliminary and final site plan approval with a use variance for a strip center developer to allow the maintenance and operation of a self-service laundromat, otherwise not a permitted use in the zoning district.
- **Pleasantville, NJ Planning Board** Obtained amended preliminary and final site plan approval with associated variance relief to allow for the design modification of a warehouse/office building, based upon both Atlantic County's requirement for a dedicated right-of-way and the New Jersey Department of Environmental Protection's approval of a modification to the wetlands transition area on site. The variance relief allowed for the construction and maintenance of the building and for the installation of free-standing signage, both with a zero front-yard setback.
- **Ocean City, NJ Planning Board** Obtained preliminary and final site plan approval with associated variance relief to allow for the installation and maintenance of a privacy fence system enclosing and dividing a "private boardwalk" area contiguous to a hotel condominium project, which previously was the subject of an amendment to the City's Redevelopment Area Plan. After a series of hotly contested appearances before both City Council and the Zoning Board of Adjustment, we obtained the amendment to the Redevelopment Area Plan to allow for the conversion and reconstruction of abandoned retail space to residential hotel suites. The approval of the fence system completed the application process.

For more information, please contact John L. Grossman at 609.572.2322 or jgrossman@foxrothschild.com.

Application of Antidegradation Requirements to Onlot Sewage Systems

By Carrie B. Nase

At a March 2010 meeting in Wayne County, the Pennsylvania Department of Environmental Protection attempted to provide initial draft guidance to an audience of developers as well as county and state officials. It distributed a draft document titled "Application of Antidegradation Requirements to Onlot Sewage Systems in Special Protection Waters."

As a result of *Lipton et al v. DEP* (2008), the Environmental Hearing Board stated that the Department was "...required to consider whether the approval of a sewage module was consistent with regulations promulgated to effectuate the mandates of the Clean Stream Law, including the antidegradation requirements." The purpose of DEP's draft document is to outline a process for determining whether a proposed onlot sewage system conforms to antidegradation requirements applicable to special protection waters (high quality and exceptional value).

To assist the Department in its review of cost effective and reasonable best management practices for nonpoint source controls, applicants should consider submitting additional information with their planning modules describing how the proposed method of sewage treatment and disposal ensures protection and nondegradation of special protection waters. Examples include: describe site conditions that promote natural dentrification, the use of appropriate isolation distances, analysis of actual stream data, implementation of a sewage management program, installation of nitrate removal technology, use of Individual Residential Spray Irrigation systems, etc.

DEP stresses that the draft document merely attempts to establish a framework for coping with *Lipton*-related issues and not alter existing regulatory requirements.

For more information, please contact Carrie B. Nase at 215.299.2030 or cnase@foxrothschild.com.

PA House Democratic Policy Committee Holds Hearings on Riparian Buffers

By Robert W. Gundlach, Jr.

At the request of Pennsylvania State Representative Barbara McIlvaine Smith (D-Chester County), the State House Democratic Policy Committee held a March 8 legislative hearing on the effectiveness of forested riparian buffers in protecting the receiving stream. Most testifiers came from environmental organizations, however the regulated community was represented by the Pennsylvania Builders Association (PBA).

The impact of forested buffers along waterways was discussed including their benefit to habitat improvement, stream bank stabilization, sediment pollution reduction and reduced stream temperatures. The hearing was timely in that the Pennsylvania Department of Environmental Protection, through the Environmental Quality Board, has published proposed regulations that seek to establish a 150-foot forested riparian buffer along all exceptional value (EV) streams. And as proposed, the regulation could impact the 3,000 miles of Pennsylvania's EV streams, or more. And, the use of buffers will likely be expanded even further as the regulatory promulgation process progresses.

The PBA testified to its objection to mandatory buffer requirements because of the impact they would have to job creation and job development. And, they suggested an offset program that would be funded by builders and would allow them to pay for off-site improvements as an offset to their potential nutrient loads.

For more information, please contact Robert W. Gundlach, Jr. at 215.918.3636 or rgundlach@foxrothschild.com.

Builders Denied Injunction Against Building Code

By Robert W. Gundlach, Jr.

On March 1, the Pennsylvania Builders Association argued before the Pennsylvania Commonwealth Court on behalf of its petition for preliminary injunctive relief from enforcement of the 2009 IRC building code. On March 11, 2010, the judge issued his decision on that petition.

The judge denied PBA's injunction request. As a result, the 2009 I-codes remain in effect as adopted on December 31, 2009. Keep in mind, this decision only applies to the special request for a preliminary injunction. The lawsuit challenging the constitutionality of Pennsylvania's code adoption process is likely still going forward -- pending the plaintiff's decision on the best course of action going forward.

For more information, please contact Robert W. Gundlach, Jr. at 215.918.3636 or rgundlach@foxrothschild.com.

New NPDES Regulations Proposed

By Robert W. Gundlach, Jr.

The Pennsylvania Environmental Quality Board (Board) proposes to rescind 25 Pa. Code Chapter 92 (relating to National Pollutant Discharge Elimination System permitting, monitoring and compliance) and replace it with a new Chapter 92a of the same name. This chapter describes the process that the Department of Environmental Protection (Department) uses to issue National Pollutant Discharge Elimination System (NPDES) permits for point source discharges of treated wastewater and stormwater to meet the requirements of the Federal Clean Water 1251—1387 and The Clean Streams Law (35 P. S. Act 33 U.S.C.A. §§ 691.1—691.1001).

The primary goal of the proposed rulemaking is to reorganize the existing Chapter 92 so that it will be consistent with the organization of the companion federal regulations as set forth in 40 CFR Part 122 (relating to EPA administered permit programs: the National Pollutant Discharge Elimination System). This general reorganization is extensive and requires that Chapter 92 be replaced with a new chapter, Chapter 92a, to avoid confusion.

A new NPDES permit fee structure designed to cover the Commonwealth's share of the cost of running the NPDES program is being proposed. Several new provisions to incorporate recent new requirements in the federal program are also proposed. Certain treatment requirements are proposed to be added or reorganized to standardize the Department's approach to discharges of treated sewage and industrial wastewater.

For more information, please contact Robert W. Gundlach, Jr. at 215.918.3636 or rgundlach@foxrothschild.com.

Local Engineers Publish "Code of Conduct"

By Robert W. Gundlach, Jr.

The Chester County Engineers (CCE) association recently approved its "Code of Conduct for Pennsylvania Municipal & Consulting Engineers in the Land Development Process." CCE believes that as professions, if we rally around our shared core values, the land development process can be less contentious and more cooperative for all involved. And, CCE's Code of Conduct drafting committee felt that a strong Code of Conduct can be a first step in that process.

The CCE Code of Conduct is intended as a set of specific fundamental principles on how municipal engineers and consulting engineers should treat each other during the land development process, with the purpose of maintaining professional respect and fairness. It is firmly believed that each municipal engineer and consulting engineer who adopts this Code of Conduct into his or her daily practice of engineering will be preserving the integrity of the professional engineering license that he/she has sworn to honor and uphold, while also serving the reasonable interests of the municipalities and landowners in the land development process.

You can view the CCE Code of Conduct statement online by visiting www.chestercountyengineers.org.

For more information, please contact Robert W. Gundlach, Jr. at 215.918.3636 or rgundlach@foxrothschild.com.

State Legislation Targets Independent Contractors

By Robert W. Gundlach, Jr.

House Bill 400, prime sponsor Pennsylvania State Representative Bryan Lentz (D-Delaware County), creates the Construction Industry Independent Contractor Act. It passed out of the state House of Representatives last spring and awaits consideration by the Senate, which is expected in the coming months. Pennsylvania business groups have generally opposed the legislation while it has received its biggest support from labor.

The legislation deals with employers in the construction industry who are improperly classifying employees as independent contractors or paying them unreported compensation. It seeks to better define the differences between an employee and independent contractor.

Lentz said intentional misclassification of construction workers, such as carpenters, plumbers and laborers, has been on the rise in recent years, and the practice is driving down wages and living standards for Pennsylvania workers. He also said some workers are not told about their classification as independent contractors by their employers.

House Bill 400 would require people who work in the construction industry to be employees of the party that pays their wages unless they can prove they are legitimate independent contractors. That would mean the service or services they performed are outside of the usual course of the business of that particular employer; and that they are customarily engaged in an independently established trade, occupation, profession or business.

The bill would make the intentional misclassification of an employee a third-degree felony and impose fines. Misclassification due to negligence would be a summary offense with fines.

For more information, please contact Robert W. Gundlach, Jr. at 215.918.3636 or rgundlach@foxrothschild.com.

A Cure for Cabin Fever

By Robert W. Gundlach, Jr.

Have the record-setting snowfall and rainfall events in the Philadelphia region kept you in your home or office? Why not take advantage of the time you are stuck inside by viewing free, educational webinars? We have compiled a short list of industry-related presentations you can view over the Internet from the comfort of your own home. (Some webinars require you have proper media players installed on your computer.)

Changes in 2009 IRC Wall Bracing Requirements by the PHRC (1/12/2010)

Proposed Stormwater Rulemaking Listening Session by EPA (2/3/2010)

PA Senate Hearing on Uniform Construction Code & Sprinkler Legislation (HB1001) by PA Labor & Industry Committee (10/6/2009)

PA Legislative Preview of Smart Growth Legislation (podcast) by Renew Lehigh Valley w/State Rep. Freeman (1/22/2010)

For more information, please contact Robert W. Gundlach, Jr. at 215.918.3636 or rgundlach@foxrothschild.com.

Top Myths About Pennsylvania's Building Code

By Robert W. Gundlach, Jr.

The Pennsylvania Department of Labor and Industry released its "Top 5" myths concerning the Uniform Construction Code.

Here are the Top 5 UCC "urban legends:"

Myth #1 - Residential sprinkler designers and installers must be certified to perform these services in Pennsylvania.

Myth #2 - Any building holding an L&I certificate of occupancy and undergoing alterations (in an opt-in municipality) must satisfy all current code requirements.

Myth #3 - A UCC demolition permit is required to tear down an agricultural building.

Myth #4 - Opt-in municipalities can establish shorter [shorter than five years] expiration dates for residential building permits, without amending their UCC ordinance and without securing L&I approval of this ordinance change.

Myth #5 - REScheck cannot be used to demonstrate compliance with the energy conservation code requirements for residential construction.

For more information, please contact Robert W. Gundlach, Jr. at 215.918.3636 or rgundlach@foxrothschild.com.

Revisions Offered To Proposed Chapter 102 Regulations

By Robert W. Gundlach, Jr.

As part of the rulemaking process for Pennsylvania's proposed Chapter 102 regulations, which govern erosion and sediment control and stormwater management, the Environmental Quality Board (EQB) received more than 1,300 comment letters from stakeholders and the general public. In response to those comments, the EQB made a presentation to the Pennsylvania Water Resources Advisory Committee on February 19, 2010, highlighting some planned modifications to the proposed regulations.

Key changes include:

1) Riparian Buffers -- Expansion of riparian buffers to include High Quality (HQ) and Exceptional Value (EV) waterways, which include rivers, streams, creeks, lakes, ponds or reservoirs. The new proposal would require that a 150-foot riparian forest buffer be established along HQ and EV waters where the watershed is listed as impaired. In those watersheds where the designated use is met, a 150-foot riparian buffer must be maintained and protected.
2) Permit-By-Rule -- Elimination of the voluntary permitting scheme that would have allowed a project that meets specific, rigid criteria and incorporates certain best management practices to essentially receive a permit without a technical review.
3) Fee Schedule -- Instead of a flat $2500/$5000 fee, the EQB opted to restructure the proposed fees to create a tiered fee schedule based upon the size of the earth disturbance.
4) Effluent Limitation Guidelines -- In response to the EPA's new requirement that certain project sites monitor and limit construction runoff to a specific turbidity limit (280 NTUs), the modified proposed Chapter 102 regulations will incorporate the federal mandate.

The EQB hopes to have its revisions in place and ready for presentation to the Water Resources Advisory Committee on March 17 and be positioned to finalize the regulations this summer.

For more information, please contact Robert W. Gundlach, Jr. at 215.918.3636 or rgundlach@foxrothschild.com.

PA Senate Holds Hearing on DEP Permitting

By Robert W. Gundlach, Jr.

The Pennsylvania Senate Majority Policy Committee, chaired by Sen. Ted Erickson (R-26), held a public hearing on March 16 on improving the Department of Environmental Protection's permitting process.

The committee looked into possible causes of delays in the DEP permitting process and discussed possible solutions to make the process more "user friendly." As one testifier stated, the regulated community in Pennsylvania -- including water service providers, farmers and others -- is seeking uniformity, consistency and responsiveness in DEP's permitting actions.

"DEP faces the dual challenge of ensuring the protection of our natural resources through a process that is applied in a consistent manner statewide, without causing undue delays that impede community development and job creation," said Erickson.

Some examples of DEP permits include NPDES – National Pollution Discharge Elimination System -- air permitting and solid waste permitting.

In addition to DEP Secretary John Hanger, testifiers included an environmental lawyer, Aqua America, the American Council of Engineering Companies of Pennsylvania, Country View Family Farms based in Lancaster and the Pennsylvania Municipal Authorities Association.

The committee heard concerns about the length of time for DEP permit reviews and approvals and that regional offices are not always consistent in interpreting laws and regulations when reviewing and granting the permits. Some ask for inconsequential information, are not timely in requesting additional information from the applicant or take too long to say that the application is incomplete.

Copies of testimony and video of the hearing can be viewed here.

For more information, please contact Robert W. Gundlach, Jr. at 215.918.3636 or rgundlach@foxrothschild.com.

Bill To Amend MPC Advances to Senate

By Robert W. Gundlach, Jr.

On March 8, 2010, the Pennsylvania House of Representatives approved a measure, by a vote of 111-82, to amend the Pennsylvania Municipalities Planning Code (PA MPC). HB 1831, introduced by State Rep. Tom Houghton (D-Chester), now awaits consideration by the state senate.

This bill amends the Municipalities Planning Code, which applies to townships, boroughs, towns and cities (except Philadelphia and Pittsburgh), to allow these municipalities to amend their zoning ordinances to include review fees for conditional use applications in order to pay the cost of outside consultants who may be hired to review the applications.

Under current law, section 617.3(e) of the PA MPC enables municipalities to charge application fees pursuant to zoning ordinances to cover the cost of zoning, but it prohibits them from including the cost of "engineering, architectural or other technical consultants" in the calculation of the fee. This bill will specifically allow municipalities to charge a separate review fee to cover the cost of these consultants but only for reviewing conditional use applications.

In order to charge review fees, this bill stipulates a municipality must enact, by ordinance, a fee schedule with the stipulation that the fee charged may not exceed the rate or cost charged by the professional consultant used to review the application.

Houghton said the technical nature of a conditional use application often necessitates the municipality appoint professional consultants for assistance. While both the municipality and the applicant benefit from the advice, the cost of the expert's review and recommendations is borne solely by the municipality.

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