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Compulsory Purchase Orders

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Overview of Legal Issues when Deciding to Promote a CPO – Top Ten Tips

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Summary:

(1) Key considerations	(6) Proposals/scheme
(2) Legal challenge	(7) Alternatives
(3) Human rights/PSED	(8) Impediments
(4) Enabling power	(9) Funding
(5) Pressing need	(10) Negotiations



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(1) Key considerations

CPO must be justified by a “compelling case in public interest” – see para. 2 of MHCLG Guidance on Compulsory Purchase Process cp. **Prest** [1983] JPL 112 and **De Rothschild** [1989] JPL 173 – NB every case is fact sensitive (no partic deg of justif’n, para. 13)

CPO a “last resort” – para. 2 => engagement/negotiation

Use Statement of Reasons as checklist? see para. 196

Formalities – see Regs + paras. 20/199 (check with CLG? para. 24)



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(2) Legal challenge – s 23 of ALA 1981

Is the compulsory purchase in accordance with LPA's resolution?
see **Collis** [2008] RVR 120 and **Archway** [2015] EWHC 794 (Admin)

NB timing, see s. 25: no challenge "before/after" save as provided
in Act – **Enterprise Inns** [2000] JPL 1256

BUT possible to JR resolution before CPO actually made – **ex parte Comyn Ching** (1984) 47 P & CR 417

AND possible to JR GVD? see **Iceland** and **Argos** below

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(3) Human Rights/PSED

This aspect should of course be a given for compulsory purchase

But NB specifically para. 2 of the Guidance: officers' report seeking
authorisation for CPO should address human rights issues

And para. 6 on PSED: throughout CPO process acquiring authorities
must have due regard to s. 149 considerations

See eg **Harris** [2010] JPL 1635 and **Bracking** [2013] EWCA Civ 1345
and cp. **Horada** [2016] EWCA Civ 169

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(4) Enabling power

Para. 11: authorities should use the most specific power available for the purpose in mind, and only use a general power when a specific power is not available

Cp para. 96 on s. 226 CPOs and 149 on Housing Act CPOs – SoS might refuse to confirm or apply both tests

Not within enabling power? See Pascoe [2007] JPL 607 contrast Ainsdale [2004] 2 EGLR 9



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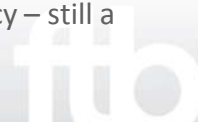
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(5) Pressing need

Another given of compulsory purchase

But NB para. 13: not essential to show land required immediately so long as “sufficiently compelling reasons” for seeking CPO powers in advance

Contrast Bromley by Bow CPO DL: regeneration = strategic objective but no specific reasons necessitating urgency – still a possibility of assembling land by agreement



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(6) Alternatives

See eg para. 106: whether purpose for which land to be acquired could be achieved by other means

De Rothschild [1989] J.P.L. 173 – alternative routes not better than CPO route because of cost and delay

Could CPO objective still be achieved if land excluded from order?
eg Bloor/Kingsway, Stratford Sail, Olympics

Cp. HS2 – tunnelling instead



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(7) Proposals/scheme

Para. 13: SoS must have a clear idea of how land to be used if CPO to be justified conclusively in public interest

Can scheme change before confirmed/implemented? See eg **Iceland** [2010] EWHC 2502, **Argos** [2012] JPL 401 and **Archway**

NB SoR now has to include justification of extent of scheme to be disregarded for compensation purposes – para. 196



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(8) Impediments to implementation

Para. 15: authority must be able to show scheme unlikely to be blocked by any physical or legal impediments to implementation, eg absence of PP or infrastructure

Planning permission not essential in advance – so long as no obvious reason why it might be withheld, eg Olympics

Cp for s. 226 CPO, para. 105 – but responsibility to show compelling case in advance of resolving uncertainties

Note **Archway** – no development agreement - not an impediment

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(9) Funding

Para. 14: LPA to provide substantive info as to sources of funding both for acquiring land and implementing scheme – only in exceptional circs reasonable to CPO land with little prospect of implementing for no. of years

Cf. para. 106: general indic of funding intentions usually suffice to show reasonable prospect scheme to proceed

Cf. **Chesterfield** [1998] JPL 568 – viability “marginal” (but note Circular 6/04 case)

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(10) Negotiations – last but not least!

Para. 2: authority expected to demonstrate reasonable steps to acquire all of the land/rights in the CPO by agreement – because CPO is “last resort”

Para. 17: build good working relationships; para. 18: fostering good will => offer full access to ADR; para. 19: eg full info on process, alleviate concerns, relocation advice, reasonable negotiation exps?

NB Heron Quays CPO IR: since objectors always willing to sell, and expectations not shown to be unreasonable, Council cannot make convincing case of serious efforts to negotiate - counts against CPO

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(11) Bonus tip!

Note publication of MHCLG Coronavirus (COVID-19) – compulsory purchase guidance

See at <https://www.gov.uk/guidance/coronavirus-covid-19-compulsory-purchase-guidance>

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Compulsory Purchase in Wales

Annabel Graham Paul

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- Compulsory purchase and compensation were ‘silent subjects’ under devolved fields in the Government of Wales Act 1998 so the Assembly could not legislate on them unless the provision “fairly and realistically” related to a devolved subject (inc. environment and highways and transportation).
- Wales Act 2017: move to a reserved model akin to Scotland – National Assembly (now called the Senedd Cymru / Parliament of Wales) may legislate on any subject outright unless expressly reserved to Westminster.



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- Wales Bill originally proposed reserving both compulsory purchase and compensation to Westminster.
- However, amended by the House of Lords so compulsory purchase devolved, but compensation reserved.
- **The result: Welsh Parliament can make primary legislation in relation to compulsory purchase in its totality, but not compensation at all.**



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An independent role for compulsory purchase in Wales?



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White Paper for new Welsh Infrastructure Consent (April 2018)

- Will require primary legislation.
- Suggested opportunity for streamlining process for confirming non-Ministerial CPOs by delegating this responsibility to Planning Inspectors in certain circumstances.
- Proposals to broaden the power to award costs, so it is not necessary to have appeared at an inquiry for a successful objector to a CPO to be awarded their costs.

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Law Commission Report (December 2018)

- Law Commission Report (December 2018) on a New Planning Code for Wales (by Dr Charles Mynors) considered, but rejected, the idea of including compulsory purchase within a new Planning Bill (Report at [16.98]).

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National Assembly, Economy & Skills Committee Compulsory Purchase Review (June 2019)

- Borne out of review of WG work on town centre regeneration and active travel.
- Aim to streamline process within existing powers and build confidence in use of CPOs.
- Concern that local authorities are not using CPO powers in Wales very frequently so there aren't people with the right skills and expertise.
- Desire to 'unblock' the use of CPOs to develop cycle routes.

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WG Response Proposal 1: Updating the Circular

- Update the Circular to provide a clear steer to local authorities on the benefits of the CPO process and actively challenge negative perceptions (and update active travel guidance).
- New Draft Circular 003/2019 published for consultation in October 2019.
- Consultation ended in January 2020.
- Summary of Consultation Responses published 4 May 2020. WG have said Circular will be adopted subject to amendments proposed. There was overall support.

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The new look draft Circular

- Style is discursive and informative, similar to a practitioner text.
- Designed to assist local authorities to have greater confidence in using CP powers (see 8).
- A revision to Planning Policy Wales is proposed so that CPO will be used “where necessary” rather than in “exceptional circumstances” (PPW para 3.53).
- Consideration of whether LPAs should adopt general policies in their local plans concerning CPO criteria (18).

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The new look draft Circular cont.

- Examples of best practice e.g. erection and maintenance of site notices.
- Template model claim form for compensation.
- Guidance on compulsory purchase enabling powers and procedure for making a CPO.

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WG Response Proposal 2: Pre-checking service

- WG should emulate the Scottish Government's pre-checking service for draft CPOs by establishing a small expert unit within WG to conduct timely, enhanced technical pre-checks.
- WG responded saying will present options to the Minister by March 2020, unknown if any yet produced.



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WG Response Proposal 3: Alternative Dispute Resolution

- WG should encourage both sides to engage in ADR rather than Court proceedings.
- WG have responded saying they are engaging with the RICS dispute resolution service on improvements to the RICS ADR offer for CPO compensation work.
- Draft Circular provides that there should be consideration of mediation / ADR to remove objections (52, 61 – 63).



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WG Response Proposal 4: Guidance & Training

- Provision of detailed guidance, training and seminars to improve confidence and dispel myths and provide a central unit in Wales to act as a shared resource of expertise on CPOs for Acquiring Authorities.
- WG will produce a CPO Manual for AAs and consider the delivery of a training programme to accompany it.

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Well-being of Future Generations (Wales) Act 2015

- All public authorities in Wales have a statutory duty to carry out sustainable development by acting in a manner that seeks to ensure that the needs of the present are met without compromising the ability of future generations to meet their own needs.
- Draft Circular requires compliance with the FG Act (15 – 19). Statement of Reasons and Statements of Case will have to refer to FG Act.

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- The M4 decision set out that, contrary to the submissions of the Wellbeing of Future Generations Commissioner, development does not have to satisfy all seven goals and all well-being objectives and they do not have to be satisfied equally across all the goals and objectives.



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Any questions?

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Flexibility and Alternatives v. Necessity

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Necessity

- AA must establish 'substantial justification in the public interest' in favour of the compulsory acquisition of land which is capable of outweighing the substantial weight which must be afforded to the constitutional right of private land ownership; *Chesterfield Properties Plc v SSETR* (1997) 76 P&CR 117 at [130 – 131].
- Or a 'compelling case in the public interest' (*The Critchel Down Rules & Pascoe v First Secretary of State* [2007] 1 WLR 885 at [66]. DCLG 'Planning Act 2008. Guidance related to the procedures for the compulsory acquisition of land' (Sept 2013) [8]
- There must be a clear case justifying depriving a landowner of their rights in the public interest *R (Hall) v First Secretary of State* [2007] EWCA Civ. 612 at [15].

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An alternative proposal does not of itself prevent there being a compelling case in the public interest under UK or ECHR (*James v. UK* (1986) 8 E.H.R.R. 123 at [51]).



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But when assessing whether a compulsory purchase order is necessary, fairness *may* require adequate consideration to be given to obvious alternatives — and this is so even if those alternatives have not been advanced by the parties. And if alternatives have been advanced by the parties, then adequate consideration must be given to those alternatives before a compulsory purchase order is confirmed *R (Hall) v First Secretary of State* [2007] EWCA Civ. 612 at [20 – 23]. See consideration in FCC [12-30] & *R (Mars Jones) v SoS for Business Energy and Industrial Strategy* [2017] EWHC; 1111 (Admin) [54-62].

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Alternatives as Part of Proportionality & Fair Balance

- *R. (Clays Lane Housing Cooperative Ltd) v. Housing Corp* [2005] 1 WLR 2229 at [25]
- *Pascoe v First Secretary of State* [2007] 1 W.L.R. 885. see
- *R. (Hall) v. First Secretary of State* [2008] J.P.L. 63 at [15]
- *Bexley LBC v. Secretary of State* [2001] EWHC Admin 323 at paras. [44], [47] & [48]
- *R (on the application of MWH&H Ward Estates Ltd) v Monmouthshire CC (No.2)* [2002] EWHC 229 (Admin); [2002] E.H.L.R. 14 on appeal [2002] EWCA Civ. 1915 .

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Types of alternatives

R (oao FCC Environment (UK) Ltd) v Secretary of State for Energy & Climate Change [2015] EWCA Civ. 55 3 examples given by SS [para 11]

- – Land proposed to be acquired may be excessive because development proposals can be constructed without needing that land to be acquired;
- – Acquisition of a right over the land, rather than its acquisition, might suffice;
- – Land may be necessary for the development, but landowner may be willing to agree to sell

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Any land which falls within the footprint of a compulsory purchase order must be required for the purpose that the acquiring authority is relying on — it is unreasonable to seek to acquire more land than is required for the statutory purpose which is being relied on. (*Webb v Minister for Housing and Local Government* [1965] 1 WLR 755)

(see e.g. *North Killingholme Power Project Examining Authority's Report of Findings and Conclusions and Recommendation to the Secretary of State for Energy and Climate Change* [6.164]).

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Thank You

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Human Rights Issues in Compulsory Purchase Orders

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Three Issues

This presentation will cover three broad issues:

1. What are the relevant sources of human rights obligations in the United Kingdom?
2. How do these obligations apply in the context of compulsory purchase orders?
3. What approach do the courts take when faced with challenges to compulsory purchase orders on human rights grounds?



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Sources of Human Rights Obligations (1)

- Human Rights Act 1998 – it is *'unlawful'* for a public authority (inc. acquiring authorities and authorising authorities) to act in a way which is incompatible with Convention rights (s. 6(1))
 - where there has been a breach of this obligation, the resulting act will be liable to be quashed on the ground of illegality ([2003] UKHL 68)
- Common Law – the common law has *'come to recognise that there exists rights which should properly be classified as constitutional or fundamental'* (Thoburn [2003] QB 151)
 - e.g. the right to peaceful ownership of property (Chesterfield Properties [1998] JPL 568)



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Sources of Human Rights Obligations (2)

- International Law – often reference made to international human rights treaties, but the orthodox position is ‘*although they are binding on the United Kingdom in international law, treaties are not part of UK law and give rise to no legal rights or obligations in domestic law*’ (*Miller (No 1)* [2017] UKSC 5)
 - some limited role for international law (*SG* [2015] 1 WLR 1499, [235] - [262]) but will not generally arise in practice, save for in the context of the rights of children, where it is well-established that the best interests of children must be a primary consideration, which derives partly from art 3 (1) UNCRC (*Collins* [2013] EWCA Civ 1193, [7] - [11]).



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Human Rights in Compulsory Purchase (1)

- MHCLG, ‘*Guidance on Compulsory Purchase Process and The Crichel Down Rules*’ (July 2019):
 - ‘*when making and confirming an order, acquiring authorities and authorising authorities should be sure that the purposes for which the compulsory purchase order is made justify interfering with the human rights of those with an interest in the land affected*’ (p. 6);
 - ‘*particular consideration should be given to the provisions of Article 1 of the First Protocol [...] and in the case of a dwelling, Article 8*’ (p. 12);
 - statement of reasons justifying the order should ‘*have regard*’ to Article 1 of Protocol 1 and Article 8 ‘*where appropriate*’ (p. 86).



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Human Rights in Compulsory Purchase (2)

- Article 8 engaged if there is an interference with ‘*private and family life*’, ‘*home*’ or ‘*correspondence*’
- The concept of a ‘*home*’ is broad one – not only ‘*dwelling*’
 - looking for the existence of ‘*sufficient and continuous links*’ (*Winterstein* (27013/07) at [141]);
 - those links do not need to have a lawful basis (*Buckley* (1997) 23 EHRR 101, [54]);
 - broad enough to encompass some business premises (*Buck* (2006) 42 EHRR 21, [31]), but not all (*Khamidou* (2009) 49 EHRR 13, [131]);
 - will not cover land on which someone intends to build a home (*Loizidou* (1997) 23 EHRR 513, [66]).

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Human Rights in Compulsory Purchase (3)

- Similarly, ‘*private and family life*’ is broad:
 - private life incapable of exhaustive definition (*Pretty* [2002] FLR 45, [61]);
 - includes a right to personal development, the right to establish and develop relationships in the outside world (*Pretty* [2002] FLR 45, [61]), including professional relationships (*Niemietz* (1993) 16 EHRR 97, [29]);
 - protection of ethnic identity (*Tasev* (9825/13), [32]);
 - any impacts on particularly vulnerable groups given special consideration (*Connors* (2005) 40 EHRR 9, [84]);
 - family life can include non-formal, ‘*de facto*’ familial relations (*Johnston* (1987) 9 EHRR 203, [56]).

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Human Rights in Compulsory Purchase (4)

- Article 1 of Protocol 1 protects against interferences with ‘possessions’ which is wider than property rights:
 - looking for an existing ‘*substantive interest*’ that attracts protection (*Beyeler* (2001) 33 EHRR 52, [100]), only extends to existing possessions – does not guarantee the right to acquire possessions (*Marckx* (1980) 2 EHRR 330, [50]);
 - it can include a ‘*legitimate expectation*’ of obtaining an asset if based on a legal provision or act – a ‘*mere hope*’ is not enough (*Kopecký* (2005) 41 EHRR 43, [49]);
 - obvious proprietary rights and interests of value (e.g. freehold, leasehold, licences, option agreements etc.)



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Human Rights in Compulsory Purchase (5)

- Interesting and complex issue under Article 1 of Protocol 1 is protection against the loss of business:
 - clientele of a professional practice, built up by dint of their own work is a possession (*Malik* (23780/08), [88]);
 - ‘*marketable goodwill*’ is a possession (*Bloomsbury Institute Limited* [2020] EWHC 580 (Admin) [299] - [326]);
 - but ‘*future income*’ is not a possession, unless the income has been earned or an enforceable right to it exists (*Denisov* (76639/11), [137]);
 - the ‘*volume of future business*’ not a possession when subject to ordinary hazards of economic life (*Greek Federation Officers* (24581/94) p. 127 - 128).



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Human Rights in Compulsory Purchase (6)

- If there is an interference with either of these rights, the decision-maker should then proceed to consider:
 - whether there is a legitimate aim justifying the interference; and
 - whether the interference is '*proportionate*' (Article 8) or represents a '*fair balance*' (Article 1 of Protocol 1).
- The principles applicable when considering '*proportionality*' and '*fair balance*' are similar (*Stewart* [2003] NICA 4, [26])
- The policy based requirement to demonstrate a '*compelling case in the public interest*' has been held to '*reflect the necessary balance required by the Convention*' (*Hall* [2008] JPL 63, [15])



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Human Rights in Compulsory Purchase (7)

- Some other human rights issues that might arise:
 - Article 6 (Right to a Fair Trial) is engaged (*Cowan* [2000] NI 122 and *Pascoe* [2007] 1 WLR 865);
 - Article 9 (Freedom of Thought, Conscience and Religion) may be engaged, noting the broad scope of this article (*Ewedia* (2013) 57 EHRR 8, [80] - [82]);
 - Article 10 (Freedom of Expression) and Article 11 (Freedom of Assembly and Association), likely to be of particular relevance at the enforcement stage if there are protests etc.
 - Article 14 (Freedom from Discrimination), particularly indirect discrimination (*Biao* (2017) 64 EHRR 1, [88] - [94]).



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Approach of Courts (1)


- It is not enough for a claimant to establish that a decision-maker failed to take human rights into account, failed to fully investigate human rights concerns, or failed to follow a particular decision-making process in respect of human rights – compliance is a question of substance, not form (*Denbigh* [2007] 1 AC 100, [29] - [31]; *Belfast CC* [2007] 1 WLR 1420, [13], [15], [23], [31], [44] & [90])
- No need for a decision-maker to consider each specific interference individually – no need to conduct an ‘*immensely detailed approach to the identification of the individual private rights*’, a relatively broad brush consideration of the compelling case in the public interest will be enough (*AA5A* [2013] NIQB 30, [131])



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Approach of Courts (2)

- The question for the court in any human rights challenge to a compulsory purchase order will simply be, ‘*is the decision proportionate?*’ (*Maley* [2008] EWHC 2652 (Admin), [31])
- The Court will reach a decision on proportionality itself, using relevant factual findings of the first-instance decision-maker (*Maley* [2008] EWHC 2652 (Admin), [47])
- Where the decision-maker has reached an adequately reasoned and informed decision on proportionality, the Court will give due weight to that decision when considering proportionality for itself (*Belfast CC* [2007] 1 WLR 1420, [26]; *Maley* [2008] EWHC 2652 (Admin), [45])
- States are afforded a wide margin of appreciation in this area (*Pascoe* [2007] 1 WLR 885, [66] - [69]).



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Thank You

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Compulsory Purchase Orders

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