

Ontario Municipal Board
Commission des affaires municipales
de l'Ontario



ISSUE DATE: September 01, 2017

CASE NO(S): MM170017

PROCEEDING COMMENCED UNDER subsection 222(4) of the *Municipal Act, 2001*, S.O. 2001, c. 25, as amended

Appellant: Brian Preston
Subject: By-law No. 2017-5 to redivide from 5 wards to 4 wards
Municipality: Township of Rideau Lakes
OMB Case No.: MM170017
OMB File No.: MM170017
OMB Case Name: Preston v. Rideau Lakes (Township)

Heard: July 11, 2017 in Township of Rideau Lakes, Ontario

APPEARANCES:

Parties

Counsel

Township of Rideau Lakes

A. E. Fleming
R. Gencarelli

Brian Preston

Joan Kelly

Bernie Kelly

Sandra Preston

John Carley

Aline McRory

DECISION DELIVERED BY R. G. M. MAKUCH AND ORDER OF THE BOARD

[1] The subject of this appeal is By-law No. 2017-5, enacted by the Township of Rideau Lakes ("Township") Council on January 3, 2017 respecting the composition of Council as well as the Ward Structure within the Township.

BACKGROUND

[2] On January 1, 1998, the former municipalities of Newboro, Bastard and South Burgess, North Crosby, South Crosby and South Elmsley were amalgamated into the Township by way of an Amalgamation Order issued by the Minister of Municipal Affairs and Housing ("MMAH"), which established the current council and ward structure comprising of the mayor to be elected at large, and nine councillors, elected in specific wards. There are five wards, each representing one of the five former municipalities:

- Ward 1 (Bastard and South Burgess)
- Ward 2 (South Elmsley)
- Ward 3 (South Crosby)
- Ward 4 (North Crosby)
- Ward 5 (Newboro)

[3] Wards 1-4 are currently represented by two councillors each, and Ward 5, the smallest ward is represented by one councillor.

[4] The effect of By-law No. 2017-5 is to reorganize the Township into four wards, each represented by two council members to be elected in each of the wards and the Mayor who is to be elected at large for a total of nine members of Council. It is noted that the two smallest wards Ward 4 (North Crosby) and Ward 5 (Newboro) were merged into one ward.

THE APPEAL

[5] The Appellants, led by Brian Preston, are a group of residents who maintain that they have concerns with the democratic process in the Township, and whose primary objection with By-law No. 2017-5 is that it leaves in place two elected officials per ward and that this is contrary to the recommendations of Strategy Corp., the consultant responsible for the preparation of the report considered by Council, prior to the enactment of By-law No. 2017-5.

[6] The Appellants maintain that the new structure is also contrary to the wishes of a vast majority of the public who had an interest in and who took the time to participate in extensive public consultations respecting this issue.

[7] They also maintain that the change under the by-law will leave the municipality with a council that will continue to be ward focused instead of reflecting the township wide perspectives as advocated by the majority of the Township constituents, who participated in the public consultation process. They argue that too often, the Mayor, as the single at-large elected representative, is left to balance ward priorities with the township-wide issues on his/her own.

[8] They take the position that Council should have adopted "Option 4" recommended by the consultant (Strategy Corp.) in its report to Council. "Option 4" provided that the Township would be divided into four wards (in the same manner as was adopted by Council in By-law No. 2017-5), with one council member per ward to be elected as well as two members of council and the Mayor to be elected at-large for a total of seven members of council instead of the nine members as set out in By-law No. 2017-5.

[9] The evidence in support of the appeal consists of the testimony of Aerie Hoogenboom and John Carley, both residents of the Township.

[10] Mr. Preston sought to have Mr. Hoogenboom qualified to provide the Board with opinions as an expert in municipal government given his education and vast experience

as a Chief Administrator with a number of municipalities in the Province of Ontario as well as his involvement with the Association of Municipalities of Ontario (AMO) and subsequent work as a consultant in the municipal field following his retirement as a municipal administrator. The Board notes that Mr. Hoogenboom possesses an impressive professional background, but did not qualify him to proffer opinions as an expert given that he is a current member of Township Council, who voted on this issue. Mr. Hoogenboom had advocated for a certain position as part of the review process and accordingly, could not be said to be independent and unbiased regarding the issue before the Board. Mr. Hoogenboom was however permitted to give evidence as to his observations and it was evident from his testimony that he was very knowledgeable in the field of municipal government.

[11] Mr. Carley described himself as having had a life-long involvement in community organization expressing concern with the well-being of society and emphasized that he has worked diligently over the years to enhance citizen involvement in the democratic process.

[12] Mr. Carley argued that Township Council's decision in enacting By-law No. 2017-5 did not follow the will of the people as demonstrated during the review process lead by the consultant retained by Township Council.

[13] Both witnesses felt that Option 4 as outlined in the Strategic Corp. report to Township Council was the best course of action and that this option meets the test of effective representation recognizing the Township's unique history and provides opportunities to encourage a new Township-wide perspective as it strikes the right balance to help it move forward.

[14] They maintain that there were over 200 completed survey responses with many more participating in open house and public meetings and that over 50% of the participants supported Option 4 while only 25% supported Option 2 approved by Council. They felt that reducing council size to seven members would save the

Township some money, which is needed for infrastructure and the re-payment of a high debt load.

[15] They also maintain that under Option 2 the variance in population per councillor between the two largest wards (South Elmsley and Bastard & South Burgess and the new smallest ward (North Crosby and Newboro) is still quite significant and does not address the problem. Continuing to have two elected councillors per ward furthers the disparity between larger and smaller wards, whereas Option 4 better balances the population per councillor with the added advantage of having one councillor per ward with two at-large councillors.

[16] They believe that reducing council size from ten to nine members and staying exclusively with a ward structure is basically the *status quo* following an extensive process with considerable effort having been expended by the community. They also advocate that the combined system outlined in Option 4 is more democratic as it allows all voters to have a say in selecting four of seven members of Council representing over half the size of Council. Furthermore, they also argue that the option selected by a slim majority of council gives the community a say in selecting three of nine members in the 2018 election and thereafter if the new system of election is approved and will lead to a council that is unaccountable.

[17] They further maintain that the reasoned compromise proposed by the consultant to maintain four wards and introduce two at-large councillors is a workable solution and is supported by the public.

Township Position

[18] Counsel for the Township at the outset of the hearing put forth an argument that the Board does not have the jurisdiction to provide the remedy sought by the Appellants in this case since they are not taking any issue with the selection of Option 2 as it pertains to the division, re-division, or dissolution of wards. The option they are advocating for has the exact same ward boundary structure as Option 2, but with a

different composition of Council for which there is no right of appeal pursuant to s. 217 of the *Municipal Act*.

[19] Section 217 of the *Municipal Act* (“Act”), specifically addresses municipal decisions regarding the composition of Council, which include decisions about the number and types of Council members.

[20] Sections 222 and 223 of the Act, address the separate and distinct issue of ward structure. Under s. 222, a municipality is given the authority to pass a by-law dividing or re-dividing the municipality into wards, or dissolving existing wards. This has been interpreted as allowing a municipality to change both the number of wards and/or the boundaries of wards, or to dissolve wards altogether in favour of the election of councillors at large.

[21] Section 222(4) provides for an appeal of a by-law addressing such issues to this Board, and s. 222(7) specifically permits the Board to make an order affirming, amending, or repealing a by-law dealing with ward structure.

[22] Furthermore, s. 223 of the Act is a provision that allows electors to make a petition asking Council to pass a by-law dealing with the same type of ward structure issues outlined in s. 222. Under s. 223(4), if Council fails to pass the by-law requested, the electors have the right to bring an application to the Board to have the municipality divided or re-divided into wards or to have the existing wards dissolved. Subsection 223(5) gives the Board the authority, upon such an application, to make an order dividing or re-dividing wards, or dissolving existing wards.

[23] The Township also takes the position that the appeal should be dismissed on the grounds that there is no compelling evidence before the Board to establish that the chosen option will result in a disparity of voting power or ineffective representation. Furthermore, the Appellants have failed to demonstrate that the by-law was unreasonable under the circumstances and that the Board should defer to the local knowledge and determination by Council as to what is in the best interests of the electors it represents according to the Township.

[24] The Township also argues that while the Appellants have asserted that other options that were available should have been preferred over the chosen option, that is not the issue that the Board must decide on such an appeal, but rather the question is whether the chosen option meets the test of effective representation.

FINDINGS

[25] The Board has carefully considered all of the evidence as well as the submissions of counsel and the Appellant, Brian Preston, and finds that the appeal should be dismissed for the reasons that follow.

[26] Firstly, with respect to the powers of this Board on such an appeal, the Board relies on the decision of the Divisional Court in *Wagar v London (City) 2006 CarswellOnt 1094 (Ont Sup Ct (Div Ct))*, which confirms that this Board did not have the jurisdiction to hear an appeal, which is related solely to the composition of Council.

[27] In that case, a professor at the University of Western Ontario, together with some other individuals, circulated a petition under s. 223 of the *Municipal Act*, which was filed with the City of London and contained the signatures of at least 500 qualified electors. The substance of the petition was asking that City Council enact a by-law to re-divide the municipality into 14 smaller wards with one councillor per ward and also eliminate the City's Board of Control. At the time the petition was made, the City of London was divided into seven wards with two councillors elected from each ward, as well as a Board of Control and mayor elected at large.

[28] When no such by-law was passed within the timeline outlined in s. 223, the electors brought an application to the Board under s. 223(4) of the Act asking the Board to make an order re-dividing the wards of the municipality as requested. Following a hearing, the Board ordered that the mayor and Board of Control be elected at large, and, divided the City into 14 wards.

[29] The City sought leave to appeal to the Divisional Court, which held that the Board did not exceed its jurisdiction when it made the order and had the power to make the

order that it did. The Court found that there was no reason to doubt the correctness of the order, and therefore leave to appeal was not granted.

[30] The Court confirmed that the Board does not have jurisdiction to hear an appeal only dealing with Council composition (ie. the number of councillors elected both at large and through wards) as s. 217 of the Act, which addresses such issues, does not contain a specific appeal provision providing the Board with such jurisdiction. The Board only has jurisdiction to consider an appeal or an application regarding ward boundary structure under s. 222 or 223 of the Act, respectively.

[31] At paragraph 14, the Court stated the following:

It is true that the City has the power under s. 217 of the *Municipal Act, 2001* “to change the composition of council” and pursuant to s. 222 “despite any Act” to “divide or redivide the municipality into wards or dissolve the existing wards” subject to certain rules and requirements that are set forth in the sections. However, the exercise of that power is subject to review. Section 222(4) provides for an appeal to the Board by the “Minister or any other person or agency” who object to a by-law passed by a municipality to “divide or redivide the municipality into wards or dissolve the existing wards.” I note that there is no similar provision contained in s. 217 regarding a municipality’s decision regarding the composition of its council. Nonetheless, as I shall illustrate shortly, it is my opinion that the municipality’s power to change the composition of its council is not absolute in all circumstances.

[32] The City of London had argued that the Order made by the Board, in increasing the number of wards, indirectly changed the composition of Council, and therefore the Order fell outside of the Board’s jurisdiction. The court summarized the argument at paragraph 25.

As I have noted above, the Board did not order the number of councillors who should be elected from each ward, as the City alleges. On the other hand, it is clear from Mr. Gates’ reasons issued on November 22, 2005 that he favoured 14 wards with one councillor elected to represent each ward. However, he did not incorporate that preference into his order. The City argues that only its council has the right to determine its composition pursuant to s. 217, that the Board has no power to fix the number of councillors in each ward, and that it cannot do indirectly by its order what it cannot do directly.

[33] The Court, found that the Board, in making an Order that speaks to the re-division of wards, might incidentally result in a ward structure that alters the composition of Council. However, the incidental effect of such an Order is insufficient to declare that Order invalid as being outside of the Board's jurisdiction. The court stated:

It is entirely feasible that a decision by the Board speaking only to the redivision of wards might result in an order, made legitimately and on proper grounds, that incidentally changes the number of wards so that they either exceed or fall short of the number of existing councillors...This would indeed change the composition or makeup of City Council. Yet the Board clearly has the power, "despite any Act", to divide, redivide or dissolve the existing wards.

It follows logically then that the intention of the Legislature must have been that the Board, when acting under s. 223(5), has the power, incidental to its power to divide, redivide or dissolve the existing wards, to thereby change the composition of City Council, even if the ultimate decision about the composition may be left by the Board to the City Council to exercise pursuant to s. 217. In effect, it can be argued that the Board can "do indirectly what it cannot do directly" if in exercising its power properly to redivide wards in a municipality it incidentally affects the composition of council

I emphasize that the Board did not order a reduction in the number of councillors from two per ward to one per ward. It ordered the establishment of 14 wards but it made no order about the number of councillors per ward. As noted above, my opinion is that it is open to City Council to pass a by-law pursuant to s. 217 fixing the number of councillors to be elected from each ward. It is an issue that is within the power of City Council to address pursuant to s. 217.

[34] This decision supports the proposition that, on appeal, the Board has no jurisdiction to address directly issues raised regarding the composition of Council. However, if a legitimate ward boundary issue is raised and the Board makes an order which incidentally affects the composition of Council, only then will such an adjustment fall within the Board's jurisdiction on an appeal under s. 222 or an application under s. 223.

[35] The Board finds that the appeal herein falls outside its jurisdiction under s. 222 of the Act. In substance, this appeal contains only issues regarding the composition of Council, and contains no complaint related to ward structure.

[36] The appeal does not raise issues with respect to any “division, re-division, or complete dissolution of wards” associated with the By-law, but rather simply asserts disagreement with Council’s choice regarding the number of councillors elected overall, and the number of councillors elected through wards and at-large. These are purely issues of composition that are within Council’s discretion under s. 217 of the *Municipal Act, 2001* and for which there is no right of appeal found in the Act.

[37] It is clear from the evidence before the Board that the chosen option consists of a nine member Council with eight ward councillors (two per ward) in addition to a mayor elected at large and that the existing ward boundaries remain unchanged with the exception of merging Wards 4 and 5.

[38] A comparison of Option 2 with Option 4, shows that the two options consist of the same ward structure and boundaries. These options only deal with the merging of Wards 4 and 5 into one ward. The difference between the two options is simply the number of councillors elected overall, as well as the number of councillors elected per ward and at large. Option 4, unlike Option 2, involves a seven member Council with four ward councillors, two at large councillors and the mayor.

[39] It is also quite clear from the appeal letter and the evidence before the Board, that the Appellants’ issue with Option 4 is not related to ward boundaries or ward structure, but rather related solely to the number of councillors elected overall, and the number of councillors elected in wards and at-large.

[40] With respect to the reasonableness of By-law No. 2017-5, the evidence of Mike Dwyer, the Township’s Chief Administrative officer, who was qualified by the Board as a land use planner and as having particular expertise in the analysis of demographic data, was un-contradicted and quite convincing.

[41] Mr. Dwyer explained that the enactment of By-law No. 2017-5 followed an extensive public process, which began with the preparation of terms of reference for a study to be undertaken by a consultant retained to conduct the necessary work. The process involved extensive data collection and research, stakeholder interviews, and

significant public consultations. The result of the review was a final report containing several potential options for Council Composition and Ward Structure presented to Council in November 2016. It is noted that the Appellants did not take issue with the terms of reference for the study to be carried out by the consultant and in fact agreed that these were quite appropriate. They also agreed that the public process followed and carried out leading up to the enactment of By-law No. 2017-5 was fulsome and resulted in extensive input from the public.

[42] The Report addressed the current ward structure and Council structure for the Township and concluded that the status quo did not meet the test for effective representation.

[43] Mr. Dwyer explained that after the Final Report was presented, received, and acknowledged by Council, a special meeting was held where members of the public were permitted to make delegations regarding the options contained in the Final Report. After this meeting, both members of Council and members of the public were invited to submit additional options which would be assessed by the consultant. Only one additional option was submitted and assessed in a Supplementary Report dated December 19, 2016.

[44] The appeal of By-law No. 2017-5 is governed by s. 222 of the Act, which provides as follows:

(4) within 45 days after a by-law described in subsection (1) is passed, the Minister or any other person or agency may appeal to the Ontario Municipal Board by filing a notice of appeal with the municipality setting out the objections to the by-law and the reasons in support of the objections.

(7) the Board shall hear the appeal and may, despite any Act, make an order affirming, amending or repealing the by-law.

[45] The Act or regulations do not set out any criteria a municipal council must follow when establishing municipal ward boundaries.

[46] The Supreme Court of Canada in *Reference re Provincial Electoral Boundaries [1991] 2 S.C.R. 158* established reasonableness as the standard for review finding that the courts ought not to interfere with the legislature's electoral map under s. 3 of the *Charter* unless it appears that reasonable persons applying the appropriate principles could not have set the electoral boundaries as they exist.

[47] This Board adopted the test of reasonableness as the standard of review to be applied in considering appeals under s. 222 of the *Act* in *Savage v. Niagara Falls (City)*, [2002] O.M.B.D. No. 1074.

This Board should not lightly interfere with that decision unless there are very clear and compelling reasons to do so. The Board should be satisfied that city council acted fairly and reasonably. If the Board is so satisfied, deference should be accorded to Niagara Falls council, who are in a better position than the Board to determine what is the appropriate electoral system to provide fair and effective representation to its constituents.

[48] In *Teno v. Lakeshore (Town)* [2005] O.M.B.D. No. 1245, this Board found that there must be clear and compelling reasons for the Board to interfere in a municipal council's decision on these matters, and that an appellant may have to demonstrate that a municipal council has acted unfairly or unreasonably in making a decision on these issues. The Board will in the absence of compelling evidence to the contrary defer to the local knowledge and determination of the Municipal Council that resulted from a full review of the various ward boundary options available to them.

[49] The analysis as to whether a ward boundary by-law is reasonable is carried out in accordance with the test established by the Supreme Court of Canada decision referred to above, which found that absolute voter parity is impossible and that it is impossible to draw boundary lines which guarantee exactly the same number of voters in each district even with the aid of frequent censuses.

[50] The Court also found that even if such voter parity was possible to achieve, it may prove to be undesirable because it would have the effect of detracting from the primary goal of effective representation. Factors like geography, community history,

community interests and minority representation may need to be taken into account to ensure that legislative assemblies effectively represent the diversity of the social mosaic.

[51] The Court further found that deviations from absolute voter parity may be justified on the grounds of practical impossibility or the provision of more effective representation. It found that only those deviations which can be justified on the ground that they contribute to better government of the populace as a whole, giving due weight to regional issues within the populace and geographic factors within the territory governed should be admitted.

[52] Mr. Dwyer set out a detailed decision making and implementation process for Council, which involved permitting the public and other members of Council to submit other suggested options to StrategyCorp for assessment. The process also required that all options that were determined by the Consultant to meet the test for effective representation be submitted to Council upon which Council would elect a preferred option through an exhaustive ranked ballot exercise. Implementation would then occur through a process of direct implementation.

[53] On November 29, 2016, members of the public were given the opportunity to make delegations at a Special Meeting of Council. After the Special Meeting of Council, one additional suggested option was submitted to StrategyCorp which was fully assessed by StrategyCorp, and an addendum was published to its report on December 19, 2016.

[54] At the Council meeting, on January 3, 2017, councillors were provided with ballots and given the opportunity to rank all options that were determined to meet the test for effective representation. After the first round, all ballots were read aloud by Mr. Dwyer and recorded and it was clear that a majority of councillors had ranked Option 2 as their most preferred option. A vote was then conducted and passed identifying Option 2 as the preferred Option in accordance with the decision making process previously agreed to by Council. By-law No. 2017-5 was then enacted.

[55] The process undertaken in the Township was open, inclusive and reasonable. Also, the retainer of an experienced and independent Consultant by the Township to conduct the review process also ensured that Council was provided with a detailed analysis of various options to assist in making its final decision.

[56] The uncontradicted evidence of Mr. Dwyer is that By-law No. 2017-5 creates a system of voter parity and results in effective representation. Mr. Dwyer came to this conclusion after a thorough review of the Consultant's reports.

[57] Mr. Dwyer confirmed in his evidence the findings of the Consultant that, under Option 2, all four wards fell within the accepted plus or minus 25% range from the average population per councillor, and therefore provided adequate voter parity throughout the Township. Mr. Dwyer conducted a thorough overview of the calculations completed by StrategyCorp to make this determination.

[58] Mr. Dwyer also confirmed in his testimony that Option 2 allowed for adequate representation of the various identified communities of interest present in the Township. Mr. Dwyer's evidence clearly outlined for the Board how a mix of a mayor being elected at large and councillors being elected through a ward system in Option 2 allowed for both local and more dispersed communities of interest throughout the Township to have adequate representation. In particular, Mr. Dwyer stated in his evidence that Option 2 clearly meets the needs of local communities of interest which are based on pre-amalgamation boundaries through a ward structure that largely reflects these boundaries. Mr. Dwyer also explained how representation for the other more dispersed communities of interest throughout the Township is achieved through the election of an at-large mayor. Mr. Dwyer also discussed how these more dispersed interests also make up a significant portion of many of the wards outlined in Option 2, encouraging the interests of these communities to be heard and supported by local councillors as well. There is no evidence before the Board that the ward boundaries in Option 2, which largely respect pre-amalgamation boundaries, would result in any significant geographic issues.

[59] Finally, Mr. Dwyer also confirmed that Option 2 provides for sufficient quality of representation. He explained that Option 2 involves a decrease in council size and thereby a reduction in the costs associated with Council. As well, Mr. Dwyer also confirmed that Option 2 would provide for a proportional councillor workload throughout all wards. He also commented that, given the geographic size of Rideau Lakes, maintaining a ward system with two councillors per ward ensures that quality of representation is not affected through the restructuring process and explained that having two councillors per ward ensures that councillors are easily accessible and readily available to their constituents. He concluded that Option 2 met the test for effective representation.

[60] While the Appellants have asserted that other options that were available to the Township should have been preferred over Option 2, this is not the issue that the Board must decide on this appeal. Rather, the question that the Board must decide is whether By-law No. 2017-5 meets the test for effective representation.

[61] The Board is satisfied that the consultant retained by the municipality made an adequate and in-depth assessment which took into account relevant data, including statistics regarding surrounding municipalities, as well as comments from other stakeholders and members of the public. Overall, the process was extensive and the analysis/ application of the information received to the established evaluation criteria was sound according to Mr. Dwyer.

[62] The evidence showed that aside from the communities of interest involving historical boundaries and the suburban community in proximity to Smiths Falls, an assessment of the remainder of the communities of interest revealed that these are spread throughout the entirety of Rideau Lakes, and not located just in one area. The Township is a very diverse municipality. It is geographically large and contains many different and relatively dispersed communities of interest, including large rural areas, villages and hamlets, lakefront cottages and the suburban community in close proximity to Smith Falls referred to above.

[63] It is noted that Mr. Dwyer admitted under cross-examination by Mr. Preston that he agreed with the consultant's report that Option 4 was the best alternative under consideration and that he would have recommended to Council that it adopt this option if he had been asked for his opinion. He nevertheless proffered the opinion that the analysis conducted by the Consultant was thorough and properly addressed all of the criteria that are necessary in assessing ward boundaries and accordingly, By-law No. 2017-5 meets the test for effective representation.

[64] While the Appellants have asserted that other options that were available to the Township should have been preferred over Option 2, the Board agrees with counsel for the Township that this is not the issue that the Board must decide on this appeal. Rather, the question that the Board must decide is whether By-law No. 2017-5 meets the test for effective representation.

[65] There is no compelling evidence before the Board to suggest that By-law No. 2017-5 will result in a disparity of voting power or ineffective representation.

[66] The Board therefore finds based on the un-contradicted evidence of Mike Dwyer that By-law No. 2017-5 is a reasonable exercise of Council's legislative authority and ensures relative parity of voting power as between all voters and results in a system of effective representation across the municipality in that:

- a) the process followed by the Township was appropriate, inclusive and provided Council with all necessary information on which to make a reasonable decision;
- b) the analysis conducted by StrategyCorp and confirmed by Mr. Dwyer was reasonable, detailed and thorough, considered all relevant factors, and confirmed that By-law No. 2017-5 clearly met the test for effective representation; and
- c) the Appellants have simply proposed alternative options that also meet the test for effective representation, and provided no compelling evidence for why By-law No. 2017-5 does not meet the test. The Appellant has therefore failed to

establish that the decision by Council in enacting By-law No. 2017-5 was unreasonable.

[67] The Board is satisfied that the review process followed by Council was open, inclusive and reasonable, which allowed for significant public involvement and input prior to the enactment of By-law No. 2017-5.

[68] Accordingly, the appeal is dismissed and By-law No. 2017-5 is hereby affirmed.

“R. G. M. Makuch”

R. G. M. MAKUCH
VICE-CHAIR

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Ontario Municipal Board

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