

Chapter 40B Handbook for Zoning Boards of Appeal

Massachusetts Housing Partnership
2017-2018 Training Program

Program

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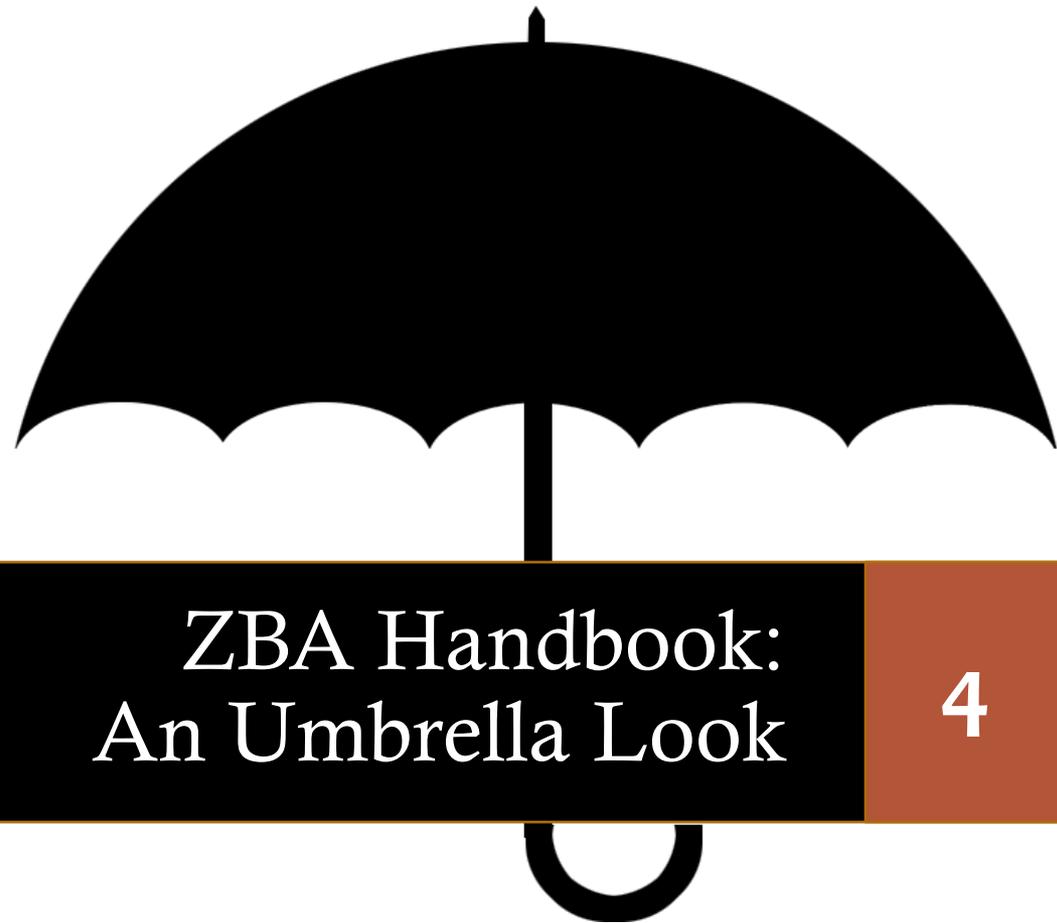
- Handbook summary
 - Background
 - Purposes
- Chapter-by-chapter review
- Periodic Q&A breaks
- Done by 8:30 (we promise!)



Presenter

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 - Private consulting practice, concentrating in fair & affordable housing, community planning, and land use and zoning.
 - Chapter 40B technical assistance consultant to Boards of Appeal.



ZBA Handbook: An Umbrella Look

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Chapter 40B Handbook for
Zoning Boards of Appeal

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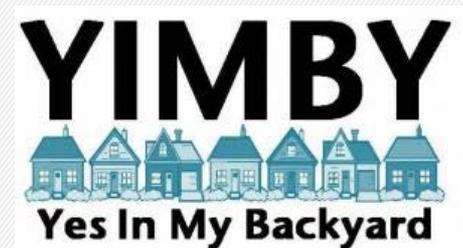
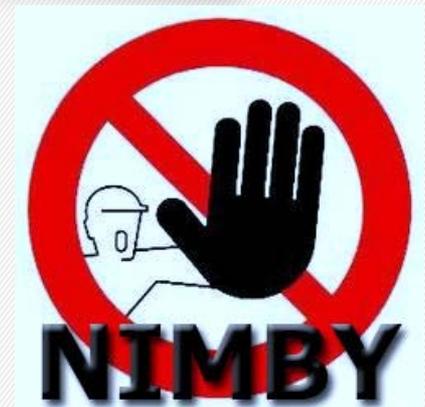
Why?

- “New” Chapter 40B Regulations (2008)
- DHCD Comprehensive Permit Guidelines
- Judicial decisions, notably *Amesbury*
- Procedural problems, e.g., the 30-day rule
- New administration
- Coordination between allied agencies and organizations

Why?

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- Comprehensive permit hearings can be difficult!
- In many towns, ZBAs ...
 - Have no/limited access to Town Counsel
 - Do not handle special permits involving plan review
 - Have limited access to staff



Purposes

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What it is ...

- Introductory in scope
- Reference guide for basic procedures
- Advisory
- Perspective: support for affordable housing development

What it is not ...

- A legal document
- A regulation
- Advocacy for 40B projects “no matter what”
- A “how-to” guide for getting to 10%

Purposes

- Intended audience:
Zoning Boards of Appeal
- Handbook recognizes
that ZBAs have a unique
role under Chapter 40B
- Constructive approach
and thought process,
not a prescription



The 40B balancing test



ZBA Handbook: Deep Dive

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Process: “big picture”

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- Stages of Chapter 40B Process
 - Project Eligibility (Site Approval) (Subsidizing Agency)
 - Comprehensive Permit Process (ZBA, and if appealed, Housing Appeals Committee)
 - Final Approval (Subsidizing Agency)
 - Construction and Occupancy (Subsidizing Agency)
 - Post-Occupancy Oversight (Subsidizing Agency)

Chapter 40B: regional planning, regional need

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- Chapter 40B: regional planning law
- Sections 20-23: comprehensive permits for low- or moderate-income housing
- Statutory purpose: to ensure that low- or moderate-income housing is available in all market areas by overriding regulatory barriers that make housing expensive to build.

Income limits

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- Most federal housing programs use percentages of Area Median Income (AMI) for income limits.
- AMI accounts for differences in wealth and recognizes that housing prices have an impact on choices available to homeowners and renters



Comprehensive permit: scope

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- All approvals under *local* regulations, such as:
 - Zoning
 - Subdivision Control
 - Local wetlands, septic system regulations
 - Historic district
 - Scenic roads
- Waivers necessary to allow construction of proposed development

Comprehensive permit: scope

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- Not within ZBA's purview:
 - Impact on municipal & school facilities available to all residents of the community
 - Fiscal impact studies
 - Tenant/homebuyer selection
 - Profit monitoring
 - Market study

Housing Appeals Committee

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- Has authority to adjudicate developer's appeal if community does not meet statutory minima or a regulatory "safe harbor"
- Consistency with local needs: balancing the *regional need* for affordable housing against *local concerns*: health, safety, open space, and site and building design

Subsidized Housing Inventory

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- The 10% Roster
 - Comprehensive permits
 - Chapter 40R
 - Inclusionary zoning
 - Other “Local Action Units” approved by DHCD
- Rental v. ownership unit: what counts?

These things really help!

1. Strong chairperson
2. Professional support, e.g., town planner, MHP Technical Assistance, town counsel or city solicitor
3. Comprehensive permit training for ZBA
4. Peer review (site civil, stormwater, wetlands, design review, traffic, etc.)
5. Developer-neighborhood meetings

Pre-qualification process

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- Application for a comprehensive permit is not valid without Project Eligibility (sometimes called site approval) determination
- Jurisdiction: subsidizing agency, mainly -
 - MassHousing
 - Massachusetts Housing Partnership
 - MassDevelopment
 - DHCD

PE application contents

- Site location and description;
- Locus map and photographs of the surrounding area;
- Proposed buildings and approximate number units by size (number of bedrooms, floor area) and type (ownership or rental);
- The name of the housing program under which a PE determination is sought;

PE application contents, cont'd

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- Preliminary development pro forma;
- Basic project details, e.g., percentage of low or moderate income units, income eligibility standards, term of affordable housing restriction, and applicant type;
- Site plan, elevation drawings, and basic site development calculations, e.g., impervious coverage, approximate open areas, number of parking spaces;

PE application contents (cont'd)

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- Approach to architectural massing and exterior building materials, and how the proposed buildings relate to adjacent properties;
- A list of proposed waivers of zoning requirements and all other relevant local bylaws, ordinances, and regulations; and
- Evidence of site control, e.g., a purchase and sale agreement or deed).

Basic process

-



Agency findings



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- Proposed project appears generally eligible under program guidelines;
- Site is generally appropriate for residential development;
- Conceptual project design is generally appropriate for the site;

Agency findings, cont'd

- Project appears financially feasible under subsidy program guidelines;
- An initial pro forma has been reviewed, including determinations of land valuation and compliance with DHCD profit limitation guidelines;
- Applicant is an eligible entity;
- Applicant has site control.



The Hearing Process

ZBA's exclusive jurisdiction

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You can reduce some headaches if ...

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- ZBA adopts Chapter 40B administrative rules and regulations substantially consistent with 760 CMR 56.05.
- Regulations include comprehensive permit application form and filing requirements, fees, and basics of the public hearing process.
- Tell the applicant how to apply, the information you need, and how you will process the application once you receive it.

Statutory Minima



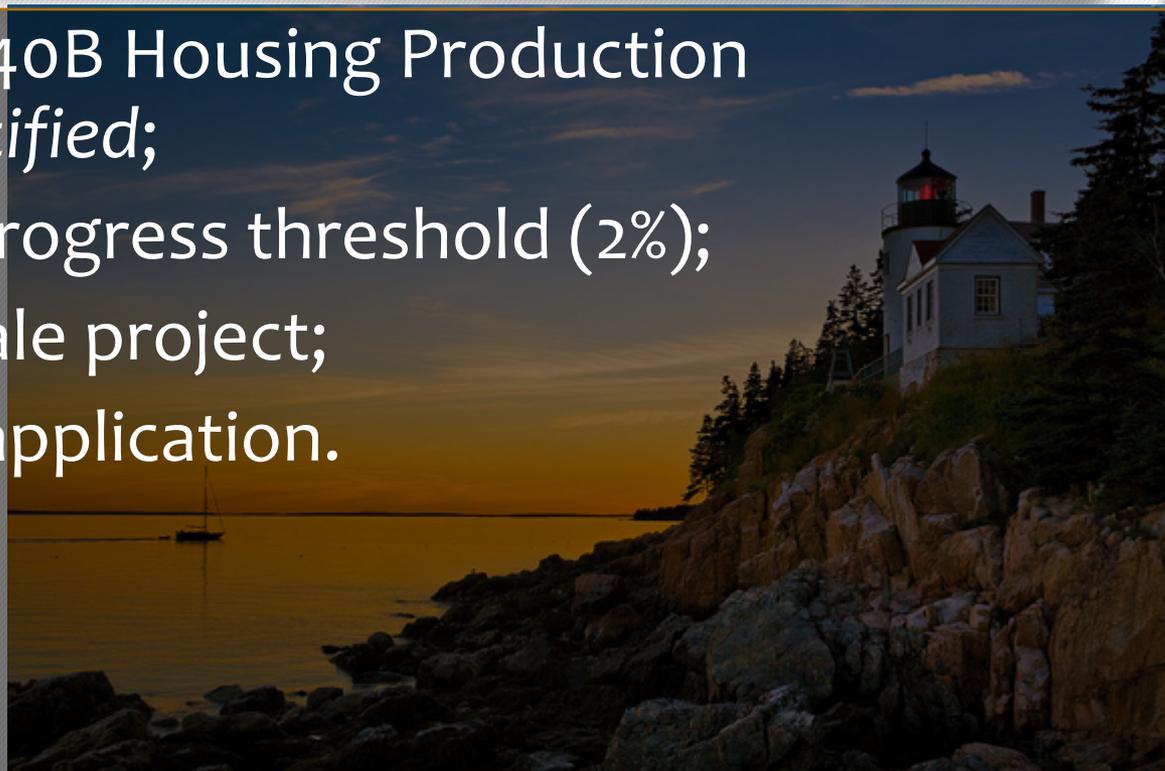
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1. The number of LMI units exceeds 10% of total year-round housing reported in the most recent census;
2. LMI housing exists on sites equal to/greater than 1.5% or more of community's total land area zoned for residential, commercial or industrial use;
3. Comprehensive permit would lead to construction of LMI housing on sites comprising more than 0.3 of 1% of the community's total land area zoned for residential, commercial or industrial use, or 10 acres, whichever is larger, in one calendar year.

Regulatory Safe Harbors

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1. Chapter 40B Housing Production Plan, *certified*;
2. Recent Progress threshold (2%);
3. Large-scale project;
4. Related application.



Critical Deadlines for Chapter 40B Comprehensive Permits

Days	Deadline	Action Required	Authority
7	No later than 7 days from the date on which the comprehensive permit application is received by the ZBA	Distribute the application to other boards and municipal departments and request their comments	G.L. c. 40B, § 21, and 760 CMR 56.05(3)
14	14 days before the public hearing date	Publish notice of the public hearing (publish twice; the second during the week following the first notice)	G.L. c. 40A, § 11
30	No later than 30 days from the date on which the comprehensive permit application is received by the ZBA	Open the public hearing	G.L. c. 40B, § 21; 760 CMR 56.05(3)
15	No later than 15 days from the opening of the public hearing	If applicable, give written notice to the developer and DHCD that the ZBA believes it can deny the permit on one or more "Safe Harbor" grounds (see Safe Harbors), along with the factual basis and documentation for its position	760 CMR 56.05(3); 760 CMR 56.03(8)
15	No later than 15 days from the date of the ZBA's written notice	If applicable, the applicant must challenge the ZBA's "safe harbor" by providing written notice to DHCD and the ZBA, along with any supporting documentation	760 CMR 56.03(8)
30	No later than 30 days from receipt of the applicant's appeal	DHCD must make a determination after reviewing the materials provided by the applicant and the ZBA.	760 CMR 56.03(8)
20	No later than 20 days from the date of DHCD's decision on a "safe harbor" appeal	The applicant or ZBA may appeal DHCD's decision by filing an interlocutory appeal with the HAC and the ZBA's public hearing must be stayed until the conclusion of the appeal.	760 CMR 56.03(8); 760 CMR 56.05(9)(c)
180	Within 180 days from the opening of the public hearing	The ZBA must close the public hearing unless the applicant has agreed in writing to an extension	760 CMR 56.05(3)
40	No later than 40 days from the close of the public hearing	The ZBA must render a decision based on a majority vote of the board and file its written decision with the city or town clerk	G.L. c. 40B, § 21; 760 CMR 56.05(8)(a)
20	No later than 20 days from the date the decision is filed with the city or town clerk	If the ZBA denies a comprehensive permit or approves it with conditions unacceptable to the applicant, the applicant must file an appeal with the HAC; other aggrieved persons must appeal to either the Land Court or Superior Court.	G.L. c. 40B, § 22; and G.L. c. 40A, § 17; 760 CMR 56.05(9)

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Memorize this chart!

If you remember nothing else from this workshop, **memorize the chart!**

Application contents

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- Preliminary site development plans;
- Existing conditions report;
- Preliminary architectural drawings;
- Building tabulations;
- Preliminary subdivision plan (if applicable);
- Preliminary utilities plan;
- PE letter;
- Requested waivers.



Internal review process

- Local boards and officials that typically review and have some authority to approve development plans, such as:
 - Conservation Commission
 - Planning Board
 - Board of Health
 - Design Review Board
 - DPW, Police, Fire – i.e., professional staff

Chapter 40B does not describe a specific procedure for conducting the public hearing. However, most ZBAs conduct a comprehensive permit public hearing by following the same protocol that applies to any other type of public hearing on a proposed development. The protocol is summarized below and it can serve as a checklist for use by ZBA chairs and chairs *pro tem*. (Straightforward task checklists can be especially helpful to first-time chairs.) Most boards require a complete presentation by the applicant, followed by an opportunity for board members, other local officials, and the public to ask questions. During this process the issues of greatest concern and any need for additional information can be identified.

Basic Public Hearing Protocol

- Open the hearing and read the public hearing notice.
- Introduce the ZBA members sitting on the case, including any associate member appointed pursuant to G.L. c. 40A, § 12.
- Explain public hearing “basics” so the applicant and public can anticipate how the ZBA will conduct the hearing and know what to expect along the way. (Some ZBAs have a short “code of conduct” poster at the front of the hearing room as a reminder, and also as an aid to people who arrive after the hearing has opened). If the ZBA customarily ends meetings at a certain time, the public should be told at the outset so they are not surprised later.
- Read correspondence into the record. (If town staff or members of boards that submitted comments are in the hearing room, acknowledge them.)
- Invite the developer to present the project.
- After the developer’s presentation, give ZBA members time to ask questions.
- Open the hearing to questions and comments from the public. Some ZBAs routinely set time limits on individual comments; others take a less formal approach and hold off on imposing time limits unless it becomes necessary. The board needs to strike a balance between providing enough time for people to be heard and avoiding needless repetition. Also, some questions from the public may need to be deferred until the ZBA receives peer review reports. For this reason, it makes sense to let abutters know as soon as possible what the ZBA’s project review schedule will be.
- Schedule a site visit. Note that site visits should be open to the public, but they are not a “meeting” under the Open Meeting Law as long as the ZBA does not deliberate during the visit. See the [Attorney General’s Open Meeting Law Guide](#) for more information.
- Decide on a date to continue the public hearing (assuming it does not open and close on the same night), in consultation with the developer. Though some comprehensive permit hearings can be completed in one evening, most proposed developments need several sessions. For example, developers will often propose some changes to their original plans in response to concerns raised during the hearing. Furthermore, developers can use time between hearing sessions to obtain additional information for the ZBA and have informal discussions with city or town staff, consultants, or abutters to the site. Hearing continuances and extensions of the decision deadline must be approved in writing by the applicant and filed with the city or town clerk.

Public hearing protocol

Remember: the chair runs the meeting!

Advice ...

- Explain the process at the outset of the hearing.
- Explain the law and the ZBA's role under the law.
- Set basic ground rules, e.g., time limits.
- Schedule a site visit, and explain relationship to Open Meeting Law.
- Set the continuance date – and ideally, set the hearing schedule for the next few months.

Technical review

- Typical services: site/civil, stormwater, traffic, wetlands, design.
- Procurement process needs to be outlined in ZBA's administrative rules.
- Technical review is *review*, not new studies commissioned by the town.

Work Sessions

- Informal discussions with applicant, usually to understand and resolve technical issues
- Outside the public hearing, but may be conducted as an open meeting
- No quorum
- Check with town counsel



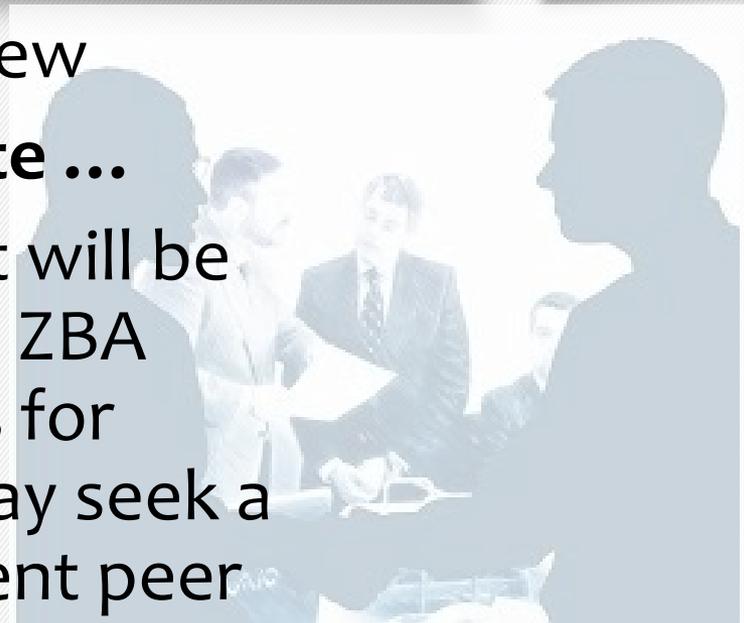
Waivers

- Applicant must identify waivers of local regulations needed to build the proposed project.
- Waiver request should be reasonably specific and clear, i.e., no “umbrella” waivers.
- ZBA decision should provide for post-permit process for addressing additional waivers that may be identified when the applicant prepares detailed plans and construction drawings.

Pro forma review

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- No “automatic” pro forma review
- **Negotiate, negotiate, negotiate ...**
- If the applicant says the project will be made uneconomic because the ZBA denies a waiver request or asks for significant changes, the ZBA may seek a pro forma review by independent peer review consultant (at applicant’s expense)



Local preference

Preference cannot be limited to people who have lived, worked, or had children attend the community's schools for some minimum period of time. Preference eligibility is based solely on a person's residence, employment status, or school enrollment at the time of the lottery for initial occupancy.

Board may request up to 70% local preference, subject to subsidizing agency approval. It is not guaranteed!

Decision

- The Board's options under Chapter 40B:
 - Denial
 - Approval with conditions
 - Approval "as is"
- Big difference between *denial* and *approval with conditions that could make the project uneconomic!*

Typical decision structure

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- Procedural history
- Governing law
- Findings of fact
- Decision
- Conditions
- Exhibits
- Ongoing monitoring agreement

Post-permit process

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- Permit modifications
- Subsidizing Agency's responsibilities:
 - “Final Approval”
 - Construction and occupancy
 - Post-occupancy requirements

Planning really matters!

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- Chapter 40B Housing Production Plan
 - Needs analysis
 - Goals
 - Five-year strategies
- Approval v. certification

More about planning!

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- City or town comprehensive plan!
- Capital improvements plan
- Municipal facilities plan
- School space needs studies
- Library needs assessment and facilities plan
- Open space and recreation plan



Questions?

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